IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1095

VERA ZABALA CLEMENTE, et al.,

*Petitioners,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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MARGARITA C. MATIAS, et al.,

*Petitioners,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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MARIA M. REYES VD. LOZANO, et al.,

*Petitioners,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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ANTIONIA NARVAEZ, et al.,

*Petitioners,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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LUISA WALKER CLEMENTE,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners, Vera Zabala Clemente, Margarita C. Matias, Maria M. Reyes Vd. Lozano, Antionia Narvaez and Luisa

Walker Clemente, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on December 16, 1977, set forth in Appendix D.

## Opinions Below

The opinion of the U.S. District Court for the District of Puerto Rico of November 24, 1976, is reported at 422 F.Supp. 564 and appears in *Appendix A*. The supplemental opinion of said District Court of February 4, 1977 is reported at 426 F.Supp. 1 and appears in *Appendix B*. The opinion of the Court of Appeals for the First Circuit reversing said District Court is not yet reported, but appears in *Appendix C*.

## Jurisdiction

The Jurisdiction of this Court is invoked under 28 USC §1254(1).

## Questions Presented

The principal questions relate to an order issued by the Federal Aviation Administration (FAA) pursuant to its statutory duties of promoting aviation safety and preventing accidents (49 USC §§1303, 1421). The order required FAA employees to maintain continuous surveillance over illegal DC-7 operators who were known to be flouting safety regulations; to conduct pre-takeoff ramp inspections of such DC-7 aircraft; and to warn passengers of any dangerous conditions. The order was the only protection available to passengers such as plaintiffs' decedents, who were unsophisticated one-time charterers.



**1. Did the First Circuit err in holding that such order was gratuitous and that passengers were not within the class protected by it, when the government admitted that the purpose of the order was to prevent recurrence of charter accidents and to save passengers' lives?**

**2. Did the First Circuit err in holding that plaintiffs were required to prove actual reliance on such order by the deceased passengers, despite the absence of such requirement in all previous FAA Tort Claims decisions?**

**3. Did the First Circuit err in ruling out liability under the Tort Claims Act on the basis of that court's conjecture that liability might inhibit safety measures, even though the only available evidence showed that the District Court's finding of liability had resulted in stronger safety performance?**

**4. Did the First Circuit err by refusing to enforce the Civil Code of Puerto Rico and by refusing to follow decisions of the Supreme Court of Puerto Rico on the issue of legal duty, as required by the Tort Claims Act, 28 USC §1346(b)?**

**5. Did the First Circuit err in characterizing the FAA order as "discretionary" and in disregarding uncontroverted evidence that the order originated at the top level of the FAA?**

## Statutory Provisions Involved

**This case involves provisions of the Federal Aviation Act, 49 USC §§1302, 1303, 1341, 1343(f), 1344(d), 1354(a), 1421, 1423, 1425, 1429, and 1485(e), which are set forth in Appendix E; provisions of the Federal Tort Claims Act, 49 USC §§1346(b), 2674, and 2680, set forth in Appendix F;**

provisions of the Civil Code of Puerto Rico, §§1058, 1802, 1803, set forth in Appendix G; and Article 1, Section 1, of the U. S. Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States. . ."

## Statement of the Case

On December 31, 1972, a DC-7 aircraft operated by Arthur S. Rivera, which had been chartered by Roberto Clemente to carry relief supplies to victims of an earthquake in Nicaragua, crashed shortly after takeoff from San Juan International Airport, Puerto Rico. All those aboard (Clemente, two other passengers and two crew members) were killed. Petitioners (the next of kin of Clemente and the other two passengers) sued the U.S. for wrongful death under the Federal Tort Claims Act. The U. S. District Court for the District of Puerto Rico found in their favor, but the Court of Appeals for the First Circuit, reviewing the finding of liability under 28 USC §1292(b), reversed.

The District Court found from uncontroverted evidence that this aircraft was being operated illegally by an uncertificated owner; that it was overloaded by 4,193 pounds at takeoff; that there was no flight engineer aboard; and that it suffered engine failure just before the crash, caused by "overboosting" of the engines, which in turn was the result of combined effects of the overloading, the lack of a flight engineer and a trained co-pilot (App. A, pp. 12a-13a). Rivera was a prototype of the illegal operator who was the subject of a mandatory continuous surveillance order issued by the Federal Aviation Administration in September 1972. The order (hereinafter called the "Southern Order") had been put into effect because of similar fatal crashes in-



volving illegal operators, and was designed to protect passengers from one of the gravest dangers in aviation: irresponsible unlicensed charter operators of large aircraft who do not have the personnel, the facilities, or the inclination to comply with air safety regulations.

The District Court found that the FAA failed to comply with its own mandatory order which required a ramp inspection of the illegal flight prior to departure, and which required the FAA to advise the passengers of any violations. The District Court ruled that this was a proximate cause of the passengers' deaths, since it was a reasonable inference that once notified of imminent danger, they would not have signed their own death warrants (pp. 16a-17a).

### The FAA Mandatory Continuous Surveillance Order ("The Southern Order")

There was uncontroverted evidence that the Southern Order arose out of a safety crisis that came to a head in 1970, when many members of the Wichita State University football team were killed in the crash of an overloaded transport aircraft operated by unlicensed persons in violation of Part 121 of the Federal Aviation Regulations (14 C.F.R. Part 121). While Part 121 contains many detailed safety requirements, the FAA found that its mere existence was not sufficient to assure passenger safety, since many operators of large aircraft were defying the FAA by failing to apply for certificates and by ignoring its safety rules. The FAA decided in 1970 that their personnel would have to take positive action to protect the traveling public, and particularly to protect *ad hoc* groups who chartered such aircraft without any means of learning that they were being operated in defiance of FAA safety regulations.

Because of this menace to *ad hoc* chartering groups, the FAA Director of Flight Standards ("FS-1") in Washing-

ton made a policy decision in 1971 to order continuous surveillance of illegal operators of large aircraft, including DC-7s. The surveillance program required coordination between Air Traffic Control ("ATC") personnel and Flight Standards District Offices (known as FSDOs). ATC was to advise the FSDO of requests from such operators for takeoff clearance, so that FSDO inspectors would be able to perform the required ramp inspection and to warn the passengers chartering the aircraft of any dangerous conditions *before takeoff*, to avoid repetition of the Wichita State disaster. FS-1 directed the Chiefs of the Flight Standards Division of each region of the FAA to promulgate such orders. Since San Juan International Airport was located within the Southern Region of the FAA, the applicable order was issued by Gordon Becker, Chief of the Flight Standards Division of the Southern Region, located at Atlanta, Ga., under nationwide direction of FS-1 in Washington. Various versions of the order had been in effect since April 5, 1971. The one in effect on the date of the Clemente accident, SO8430.20C (the "Southern Order"), was issued on September 25, 1972 (p. 13a).

It was also uncontroverted that the purpose of the Southern Order was to protect the lives of people like Clemente and his co-passengers, who were not aviation operators and would have no idea of how to determine the suitability of Rivera's DC-7. At the trial, the principal government witness, Gordon Becker, the FAA official who wrote the Southern Order on instructions from Washington, testified:

> "Q. . . . just one more time, was the purpose of this order to protect people like Roberto Clemente from getting on this airplane? A. To protect the lives of people.



> Q. Like Mr. Clemente and Mr. Lozano? A. Yes, sir.
>
> Q. People who were not operators in aviation? A. Right.
>
> Q. People who were not professionals in aviation and they saw a nice painted airplane down there and they needed to go to Nicaragua and it is on the airport and so they hired it and it is those sort of people that this is really intended to protect, wasn't it? A. Yes, sir."

The portions of the Southern Order that the District Court found pertinent are set forth in its opinion (pp. 14a-16a). By its own terms, the Southern Order was mandatory, and the District Court so found (p. 25a). This was virtually the only point of contention at the trial. The government's counsel argued that compliance with the order was discretionary, but he was unsupported even by the government's own witnesses. Thus, Gordon Becker testified that neither he (as Chief of the Flight Standards Division in the FAA Regional Office at Atlanta) nor local San Juan FSDO Chief Davis had any discretion as to the Southern Order:

> "Q. Now, FS1 asked you to do something, you have to do it? A. FS1 or the Flight Standards service in Washington sets up the National policies where the air carrier general safety programs, yes.
>
> Q. Do you have a right to change the policies? A. No, sir.
>
> Q. Does Mr. Davis have a right to change that policy? A. No, sir.
>
> Q. Very well. And based on policy from FS1, you had this staff write this order, is that right? A. That is correct."

As to a similar FAA order that used the same "will" terminology as the Southern Order, Becker admitted on cross-examination:

> "Q. Did that mean by the word will in this order that it was mandatory? A. I have to say yes.
>
> Q. Was there any discretion in carrying this out? A. No, sir."

Section 2 of the Southern Order (p. 14a) listed the FAA facilities and offices that were *required* to take action: Air Traffic field facilities and Flight Standards District Offices (FSDOs). Section 3 specified some of the action required. It ordered the San Juan FSDO to coordinate with Air Traffic Control ("ATC") to establish the method for notification of arriving and departing large aircraft (including DC-7s) that could not be readily identified as bona fide operators. Without notification from ATC that an illegal or questionable operator was seeking to take off, the FSDO inspectors would have had to maintain a constant watch on such operators. But Section 3 made it possible for the inspectors to go about their other duties until ATC notified them that an illegal large aircraft had filed a flight plan or was seeking clearance to take off. However, San Juan FSDO Chief Davis (the sole witness on this point) admitted that no notification method was established for departing aircraft. Therefore, the crucial Section 3 of the Southern Order was never implemented, and any uncertificated operator of the Wichita State-Rivera type could conduct an illegal flight from San Juan without a proper crew, in an overloaded and unsafe condition. The flight plan would be filed with ATC, and takeoff clearance would be granted by ATC without any notice to FSDO, thus practically eliminating the chances of conducting the crucial ramp inspection and giving the required warning to passengers.



Section 5 (pp. 14a-15a) described the background of the Southern Order, mentioning prior accidents involving illegal operators who had "little regard to airworthiness safety standards on their aircraft." This section stated that the purpose of the order was to protect travelers, particularly "specialized groups" like Clemente's *ad hoc* relief committee, who were amateurs in the selection of suitable aircraft operators and who were often transported in ignorance of the fact that these operators were not complying with FAA safety regulations.

Section 6 (p. 15a) set out surveillance procedures, requiring "continuous surveillance" to determine non-compliance with Federal Aviation Regulations. It then set forth steps to be taken as a minimum, again mentioning "specialized groups" as a specific concern. In Section 7 (p. 16a), the order directed FSDO inspectors to "conduct ramp inspection with at least the following emphasis to determine that the crew and operator comply with regulatory requirements for the safety of flight." It then listed twelve items as the minimum for ramp inspection, including airworthiness of the aircraft, weight and balance, and pilot qualifications. Finally, in Section 7(d), it required that "clear indication of alleged illegal flight should be be made known to flight crew and persons chartering the service." This life-saving purpose was the very heart of the Southern Order, according to the uncontroverted trial evidence. All the FAA employees who testified on this point admitted that Section 7(d) required warning to passengers.

**Rivera's History**

The description of dangerous operators in Section 5 of the Southern Order portrayed Arthur Rivera perfectly. Rivera's operation was the same type as in the Wichita

State disaster, the very activity that the Southern Order was designed to prevent. Rivera had constantly violated safety regulations for years when operating the relatively simple DC-3 aircraft; the FAA had charged him with 66 infractions of Part 121 prior to the fatal 1972 crash; and he was under investigation for another December 1972 safety violation (p. 4a). The FAA described him as "an extremely independent and headstrong person who would not take advice", and they knew that "his aviation knowledge and experience was relatively limited". They had suspended his license during his earlier DC-3 operations. The FAA report states that when he bought an old DC-7 in September 1972, "nobody in the local aviation community could envisage how he could turn this DC-7 into a profitable business." The FAA employees and the aviation community in Puerto Rico knew that Rivera had nothing but the DC-7 airplane, and that he could not possibly muster the facilities and capital required to operate a large four-engine aircraft in compliance with Part 121, which requires an airline type of organization.

It was uncontroverted that the FSDO inspectors at San Juan knew that Rivera's aircraft was the only DC-7 regularly based at San Juan International Airport. It was painted a distinctive greyish white color with a large red-orange lightning bolt down the side, so that the employees could not miss it. They knew that any charter such as the *Clemente* flight would be illegal and a menace to any group unsophisticated enough to hire Rivera. All they had to do was to comply with the Southern Order, which required ATC to notify FSDO when Rivera filed a flight plan or requested takeoff clearance, so that a ramp inspection could be conducted and the passengers warned. But the FAA admittedly flouted the Southern Order by never implementing the ATC notice required by Section 3. This was not a



momentary lapse in surveillance; it was a complete failure to implement the mandatory surveillance procedure—an outright dereliction of the Southern Order by the entire complement of both Air Traffic Control and Flight Standards personnel at San Juan.

**The Fatal Flight**

While the FAA and the "local aviation community" knew that Rivera could not operate his DC-7 legally or safely, Clemente and his "specialized group" knew nothing about him. When Rivera approached Clemente at San Juan International Airport on December 30, 1972, and offered his services to fly the fourth and last planeload of relief supplies, Clemente had no way of knowing that Rivera was an illegal operator who would gamble with the lives of his passengers. Needing another aircraft on short notice, Clemente agreed to hire Rivera's DC-7 for $4,000 under a "wet lease" which, as the District Court found, made Part 121 applicable and made Rivera responsible for operation of the flight (p. 5a). Clemente went with the flight to ascertain that the relief supplies reached the right hands in Nicaragua.

Under Part 121, Rivera was required to have a crew consisting of a qualified pilot in command, a qualified co-pilot, and a qualified flight engineer. Rivera found an itinerant pilot named Jerry Hill to act as pilot in command. Rivera decided to act as co-pilot, even though he "had no no real experience in a DC-7", in the words of the FAA report. It was stipulated that no flight engineer was aboard (p. 6a). Pilot Jerry Hill filed a flight plant with the FAA personnel in San Juan on the morning of December 31, 1972, which notified the FAA that he was going to depart from San Juan in Rivera's DC-7 on an international over-water flight (p. 7a). Since the DC-7 did not take off until

9:20 p. m., there was at least nine hours between notice to the FAA of intended departure and actual takeoff. During all that time, the ramp inspection required by the Southern Order could have been performed, but since the FAA personnel at San Juan had ignored Section 3 of the Southern Order, no notification was sent from ATC to FSDO, and Rivera's DC-7 was cleared for takeoff by the FAA tower at 9:20 p. m. in a condition that can best be described as an accident looking for a place to happen.

There was uncontroverted evidence that the DC-7 used most of the runway to get off the ground, because of its overloaded condition, and that an engine failed on the takeoff. The final radio message from the plane, shortly after takeoff, stated that they were turning around to attempt an emergency landing at the airport. It crashed in the ocean about two and one half miles from the airport, while the unqualified crew was attempting to return the overloaded airplane with an engine out (p. 7a). The District Court found that the engine failure was caused by overboosting, which in turn was caused by overloading and lack of a proper flight crew (pp. 12a-13a). The 4,193 pound overload placed an extra strain on the engines, and in the absence of a qualified flight engineer to monitor the engine instruments and properly position, adjust, and monitor the throttles, they could be pushed too far forward, overboosting the engine and thus causing engine failure on take off. These findings were consistent with the FAA's own accident report, which listed as causative factors the engine failure, the overloading, and the absence of a flight engineer. The District Court quoted from the FAA report's conclusion that these factors produced a situation wherein "for all practical purposes, the Captain was flying solo in emergency conditions" (p. 13a).



**Proximate Cause Findings**

The District Court found that plaintiffs' decedents were in the class sought to be protected by the Southern Order, and that adherence to the order by the San Juan FAA personnel would have resulted in the saving of the passengers' lives, through performance of the required ramp inspection which would have revealed the lack of a proper crew and the overloading. The District Court found that plaintiffs' decedents "would not have participated as passengers in this dubious enterprise" if the FAA inspectors had complied with section 7(d) of the Southern Order, which requires warning to passengers (pp. 16a-17a).

It was uncontroverted that the purpose of the Southern Order was to save passengers' lives by warning them. The District Court found on uncontroverted evidence that ATC personnel had actual knowledge of Rivera's intended departure at least five hours prior to the fatal takeoff (pp. 7a, 32a). Although a number of the FSDO inspectors were at a New Year's Eve Party near the airport, one inspector admittedly was on duty and could have been reached by ATC in plenty of time to take the ramp inspection, had the notification procedure required by Section 3 of the Southern Order been established.

**Government's Contentions**

Forced to admit that the ATC notification procedure had never been implemented at San Juan, the government's trial counsel sought to portray the Southern Order as discretionary, but his own witnesses refuted this position, and the District Court found these efforts unworthy of belief (p. 25a). The government also argued that the plaintiffs were claiming "negligent law enforcement"; however, plaintiffs did not sue for failure of the FAA to impose sanctions on Rivera, but for the simple failure of the FAA

to warn the passengers as required by the Southern Order. Finally, the government challenged causation, and argued that the pilot had sole responsibility for safe condition and operation of the aircraft, ignoring the fact that the Southern Order was adopted specifically to protect passengers from illegal operators who were known to be irresponsible and who deliberately evaded safety regulations.

In its post-trial briefs, the government chose to limit its argument to the discretionary function defense, and did not raise the issue of lack of legal duty (p. 28a). After the District Court decided in favor of plaintiffs and filed its first opinion (App. A), the government made a motion for reconsideration, based primarily on the duty argument. The District Court then wrote a second opinion (App. B), disposing of the duty argument. The First Circuit decision did not disturb any of the factual findings of the District Court. It reversed and dismissed solely on the issue of legal duty, holding that the Southern Order was "gratuitous" and that the passengers were not within the class protected.



## REASONS FOR GRANTING THE WRIT

### POINT I

**The First Circuit's Decision Is in Conflict With Decisions of This Court and Other Circuits on the Duties of Federal Employees Under the Federal Tort Claims Act. It So Distorts and Narrows Those Duties That Thousands of Pending Claims Will Be Thrown Into Chaos Unless This Court Resolves the Conflict.**

#### A. Importance of the Duty Issue

The First Circuit's decision, if followed by other courts, would rewrite the Federal Tort Claims Act and undo much of its 30 years of decisional law. This prospect can be expected to cause an immediate change in the litigation and settlement policies of the Justice Department in pending cases. By calling the duties of the San Juan FAA inspectors "gratuitous" (pp. 38a-39a), and by holding that the FAA statutory safety obligations and the passenger warnings required by the Southern Order created duties *only* to the FAA hierarchy and *not* to passengers of illegal operators, the First Circuit has disregarded *U.S.* v. *Union Trust Co.*, 350 U.S. 907 (1955), the only decision of this Court dealing with FAA negligence. It has also come into head-on conflict with FAA negligence decisions of six other circuits: the Second,[1] Fifth,[2] Sixth,[3] Seventh,[4] Ninth,[5] and

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[1] *Ingham* v. *Eastern Air Lines Inc.*, 373 F.2d 227 (2nd Cir. 1967) cert. den. 389 US 844 (1967).

[2] *Gill* v. *U.S.*, 429 F.2d 1072 (5th Cir. 1970), aff'd following remand, 449 F.2d 765 (5th Cir. 1971); *American Airlines* v. *U.S.*, 418 F.2d 180 (5th Cir. 1969); *Dickens* v. *U.S.*, 545 F.2d 886 (5th Cir. 1977); *Hartz* v. *U.S.*, 387 F.2d 870 (5th Cir. 1968); *U.S.* v. *Schultetus*, 277 F.2d 322 (5th Cir. 1960); *Neal* v. *U.S.*, 562 F.2d 338 (5th Cir. 1977).

(footnotes 3, 4 and 5 continued on following page)

Tenth[6] Circuits, which held that FAA employees owed an actionable duty to the airborne public.

The reasoning of the First Circuit would bar government liability for any statutory public safety function negligently executed, unless a federal statutory cause of action independent of the Tort Claims Act had been created, or unless there was proof of specific reliance by the decedents on government personnel. Therefore, the First Circuit's decision also conflicts in principle with many decisions of practically all the other circuits in analogous non-aviation cases, where the statute did not create a cause of action and no proof of reliance was required or offered.[7] Indeed, it

[3] *Wasilko* v. *U.S.*, 300 F.Supp. 573 (N.D. Ohio, 1976), aff'd 412 F.2d 859 (6th Cir. 1969); *Freeman* v. *U.S.*, 509 F.2d 626 (6th Cir. 1975); *In re Air Crash Disaster at New Orleans (Moisant Field) La. on March 20, 1969*, 544 F.2d 270 (6th Cir. 1976).

[4] *Somlo* v. *U.S.*, 416 F.2d 640 (7th Cir. 1969).

[5] *Arney* v. *U.S.*, 479 F.2d 653 (9th Cir. 1973); *Stork* v. *U.S.*, 430 F.2d 1104 (9th Cir. 1970); *U.S.* v. *Furumizo*, 381 F.2d 965 (9th Cir. 1967); *United Air Lines* v. *Wiener*, 335 F.2d 379 (9th Cir. 1964); *U.S.* v. *Miller*, 303 F.2d 703 (1962), cert. den. 371 US 955 (1963); *Spaulding* v. *U.S.*, 455 F.2d 222 (9th Cir. 1972).

[6] *Yates* v. *U.S.*, 497 F.2d 878 (10th Cir. 1974). The government was held liable for negligence of the FAA in most of the cases cited in footnotes 1-6. In those cases in which the government was not held liable, the decisions were based upon findings of proper performance of duties by the FAA, or lack of proof that failure to perform duties was a proximate cause of the accident. None of these decisions held that the FAA had no legal duty to passengers or other members of the traveling public. None of these decisions mentioned any evidence of plaintiffs' reliance upon FAA personnel.

[7] For example, in *Downs* v. *U.S.*, 522 F.2d 990 (6th Cir. 1975) the government was held liable for the actions of an FBI agent whose failure to follow an agency memorandum on negotiation with aircraft hijackers resulted in the murder of plaintiff's decedent by the hijacker; and in *Griffin* v. *U.S.*, 500 F.2d 1059 (3rd Cir. 1974) the government was held liable for negligence of HEW employees in the inspection, testing, and release to the



places the safety interests of air passengers below those of federal prisoners, since this Court held in *U.S.* v. *Muniz*, 374 US 150, 164-165 (1963), that "the duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 USC §4042, independent of an inconsistent state rule," even though the statute (in common with the Federal Aviation Act) did not create an independent cause of action, and no proof of reliance is required of federal prisoners.

While the First Circuit stands alone in calling the FAA's safety duties "gratuitous" and in reversing a finding of FAA negligence on the basis of lack of duty, its decision will cause considerable difficulty in the administration of justice. It is the only opinion that discusses duty in any detail. All other FAA negligence decisions either assumed that legal duty was automatic once the FAA ordered its personnel to perform public safety functions, or disposed of the duty question by assuming that all members of the traveling public *must* rely on the FAA to perform safety functions which it has undertaken.[8]

The United States is a party defendant in most of the major aviation disaster litigation now pending.[9] In addi-

public of polio vaccine that did not meet criteria established in HEW regulations. In neither of these cases was an independent statutory cause of action established, and neither court mentioned any proof of reliance on the FBI or the HEW.

[8] See cases cited in footnotes 1-6, *supra*. For example, in *Dickens* v. *U.S.*, the District Court (378 F.Supp. 845 at p. 855) found that the "controller has a duty to give necessary warnings simply because once the Government has assumed a function or service it is liable for negligent performance of that function" (citing *Indian Towing*). The Fifth Circuit affirmed, holding that purely on the basis of the requirement for wake turbulence warning in the controller's manual, "he had a duty to warn" (545 F.2d 886 at p. 892).

[9] *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 407 F.Supp. 244 [MDL. No. 227]; *In re Air Crash*

tion to hundreds of millions of dollars in passenger death and injury claims, huge cross-claims have been brought against the government by other defendants such as airlines. There is so much multimillion dollar aviation Tort Claims litigation that a special group handles it: the Aviation Unit of the Civil Division of the Department of Justice. In cases where FAA personnel failed to perform assigned safety functions and thus contributed to causation of accidents, the government has either been held liable or has contributed millions of dollars to multi-defendant settlements. These contributions have facilitated settlement of many major airline cases, even where no collision or traffic separation functions were involved.[10] Without government contributions, many such cases would have to be tried, imposing a tremendous burden on the federal courts.

But now that the First Circuit has held basic FAA safety duties to be gratuitous and internal in nature, why should the government contribute to settlements, even in cases where (as in *Clemente*) the FAA admits that its employees flouted their own safety orders? How can payment of Treasury funds be justified, when the only court that con-

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*Disaster near New Hope, Georgia on April 4, 1977,* —— F.Supp. —— [MDL. No. 320]; *In re Air Crash Disaster at Charlotte, N.C. on September 11, 1974,* 393 F.Supp. 1414 [MDL. No. 202]; *In re Air Crash Disaster at Pago Pago, American Samoa on January 30, 1974,* 383 F.Supp. 501 [MDL. No. 176]; *In re Air Crash Disaster near Papeete, Tahiti on July 22, 1973,* 397 F.Supp. 886 [MDL. No. 206.] None of the foregoing accidents involved collisions or traffic separation.

[10] For example, *In re Air Crash Disaster at Florida Everglades on December 29, 1972,* 360 F.Supp. 1394 [MDL. No. 139]; *In re Air Crash Disaster at Paris, France on March 3, 1974,* 386 F.Supp. 1404 [MDL. No. 172]; *In re Air Crash Disaster at Juneau, Alaska on September 4, 1971,* 350 F.Supp. 1163 [MDL. No. 107]; *In re Air Crash Disaster near Upperville, Virginia on February 1, 1974,* 393 F.Supp. 1089 [MDL. No. 199].



sidered the duty question in detail held that there is no duty without proof of passenger reliance?

**B. Need for Resolution by this Court**

Despite the importance of aviation litigation,[11] this Court has decided only one case directly involving FAA negligence, *U.S.* v. *Union Trust Co.,* 350 US 907 (1955). Certiorari was granted and the decision below was affirmed in a *per curiam* decision. The question of duty was not mentioned in the *Union Trust* appellate proceedings, the principal issue being discretionary function. The entire discussion of duty in the *Union Trust* litigation is the following sentence in the District Court's decision: "When the government, as here, takes upon itself the function—as it claims it must—of the regulation of air commerce and the responsibility, *among other things,* of regulating the flow of traffic at a public airport, the assumption of such a responsibility involves something further, namely, not only an activity designed to be protective of that amorphous group known as the public as a whole, but that of individuals as well, against potential hazards incident to such performance and implicit in its undertaking." 113 F. Supp. 80, at p. 84 (emphasis added).

Thus, in the 31 years of the Tort Claims Act, this Court has not defined the duties of FAA safety personnel. Under the First Circuit's reasoning, the creation of statutory liability to passengers, and passenger reliance, become threshold questions in all FAA negligence litigation. Indeed, these questions can be raised in almost any Tort Claims

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[11] Aviation accident cases usually comprise about fifteen to twenty percent of all federal multidistrict litigation. According to FAA statistics, there were more than 204 million domestic airline passengers and more than 180 million general aviation passengers carried in the United States in 1976, and there were 744,246 Americans holding airmens' licenses (including 187,000 students.)

case involving public safety functions. For example, although there was no statutory cause of action and no proof of reliance, the government recently contributed $5.7 million to a $20 million settlement paid to workers in a Texas asbestos plant who contracted occupational diseases that could have been avoided if government inspectors visiting the plant for survey purposes had warned workers of the hazards they found.[12] The government's settlement commitment was made prior to the First Circuit's *Clemente* decision, which reached out to comment on the potential liability of the agency involved in the asbestosis cases, the Occupational Safety & Health Administration (pp. 51a-52a, 54a). Undoubtedly the government's settlement policy in asbestosis cases will now be reviewed, and the litigation of many Tort Claims cases will be thrown into chaos, unless this Court reviews the First Circuit's decision.

### C. The First Circuit's Errors on the Duty Issue

Nothing in the Federal Aviation Act creates causes of action or specifies tort duties to passengers, and it is virtually impossible to prove that any deceased airplane passenger knew of or relied upon any specific duties assumed by the FAA. But in all previous cases involving FAA negligence, the courts assumed that passengers *must* rely on the FAA to perform duties which it had found necessary to carry out its statutory functions of promoting air safety and preventing accidents; see footnotes 1-6, *supra,* and *Union Trust Co.* v. *U.S.,* 113 F. Supp. 80, 84 (D.D.C. 1953).

Confronted by this mountain of precedent, the First Circuit attempted to distinguish the present case from other FAA cases in which negligence of Air Traffic Control

[12] *Yandle* v. *PPG Industries et al.,* Civil No. TY-74-3-CA, U.S. Dist. Ct., E. D. Texas. The government's contribution to settlement was reported in the *New York Times* on December 20, 1977, p. 30, and in *Business Week*, December 26, 1977, p. 42.



("ATC") personnel was involved (pp. 45a-48a). The First Circuit failed to mention that the great majority of reported cases based on ATC negligence involved advisory services such as weather and turbulence information rather than traffic separation or control. Of the eighteen cases cited in footnotes 1-6 *supra,* only *U.S.* v. *Schultetus* (fn. 2); *United Air Lines* v. *Wiener* and *U.S.* v. *Miller* (fn. 5); and the *Union Trust* case dealt with collisions. One case, *Arney* v. *U.S.,* 479 F.2d 653 (9th Cir. 1973) did not involve ATC at all, but was based upon alleged negligence of the same type of FAA airworthiness inspectors as those involved in *Clemente.* The Ninth Circuit held that the "safety of pilots and others aboard aircraft, as well as persons on the ground, depends upon the airworthiness certification program under the [Federal Aviation] Act", and that the pilot and navigator, who had been held contributorily negligent by the lower court, were within the class intended to be protected (479 F.2d at p. 658). Although the District Court's opinion in *Clemente* cited *Arney* (p. 13a), the First Circuit did not mention *Arney,* and stated erroneously that all the FAA cases cited by the District Court involved ATC negligence (p. 45a).[13]

The First Circuit drew specious distinctions between the duties of air traffic controllers and those of FAA safety inspectors, ignoring the fact that passengers are as likely to be killed by the FAA's failure to warn of an overloaded aircraft lacking a proper flight crew, as by the FAA's failure to warn of hazardous weather conditions, wake turbulence, or conflicts in air traffic. The government has no physical control over any privately owned aircraft.

[13] Other FAA duty cases involving safety inspectors rather than ATC personnel ignored by the First Circuit are *Hoffman* v. *U.S.,* 398 F.Supp. 530 (E.D. Mich. 1975), 14 C.C.H. Avi. L. Rep. 17646 (E.D. Mich. 1977); and *Gibbs* v. *U.S.,* 251 F.Supp. 391 (E.D. Tenn. 1965).

Whether the case involves airworthiness, traffic, or weather, the duty of the FAA is the same: to maintain surveillance, obtain information relating to flight safety, and issue instructions and warnings to the public, aircraft operators, or both.

The First Circuit stated that in the early days of commercial aviation, some air control towers "were not manned by federal employees" (p. 46a), neglecting to mention that all were manned by government employees, whether local or federal. However, this is meaningless because even today, some functions of FAA safety inspectors may also be performed by licensed Aircraft and Powerplant Mechanics and by Designated Engineering Representatives who are not government employees (see 14 CFR 65.81, 65.95). Another attempted distinction was that some decisions have held ATC personnel to duties beyond those specified in FAA manuals (p. 47a). In *Clemente,* the plaintiffs sought to hold the FAA employees only to the specific duties in the Southern Order, which makes this case stronger on duty than the other FAA cases cited by the First Circuit (p. 47a).

Finally, the First Circuit concluded that tort liability is "intrinsic in the function" of "air towers" and "air tower controllers" (p. 47a), ignoring the fact that many ATC employees held negligent were not located in towers and were not performing traffic control functions (see footnotes 1-6, *supra*). This attempted distinction is particularly ludicrous, since Section 2 of the Southern Order (p. 14a) *required* action by San Juan ATC as well as the FSDO. Without ATC notification, it was virtually impossible for the ramp inspection and passenger warning to be performed. The District Court found that there was negligence on the part of the *San Juan FAA personnel* (pp. 16a, 17a, 26a), not just the FSDO employees, since the entire complement of ATC and FSDO personnel flouted the Southern Order. The First Circuit cited no authority for a distinction "so finespun and capricious", in the words of this Court in *Indian Towing Co.* v. *U.S.* (350 US 61 at p. 68). If Congress had intended such hair-splitting, surely there would be some mention of it in the legislative history or in the Tort Claims Act itself, which contains only the single standard of liability for "any employee of the government": that of a private person under like circumstances (28 USC §§1346(b), 2674.) Fourteen categories of exceptions are listed in the Act (28 USC §2680) and others were proposed and discussed in Congress, but none relate to the First Circuit's attempted distinction between "ATC negligence" and "ATC-FSDO negligence."



Probably the most egregious errors in the First Circuit's opinion arise from its holding that there was no statutory mandate for the life-saving inspections and warnings required by the Southern Order (pp. 38a-39a). In holding that the Federal Aviation Act empowered but did not require issuance of the Southern Order, the First Circuit cited 49 USC §1354, which uses the word "empowered" (p. 38a). However, in choosing to cite only §1354, the First Circuit disregarded 49 USC §1421, the section cited and relied upon by the District Court (p. 30a) as the basis of the Southern Order. §1421(a) not only empowers the Administrator of the FAA to issue directives such as the Southern Order, but states that "it shall be his duty". §1421(b) states that in prescribing such orders, the Administrator of the FAA "shall exercise and perform his powers and duties under this Act in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents".[14]

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[14] The full text of 49 USC §1421(a) and (b), relied on by the District Court as the basis of the Southern Order, is set forth in Appendix E, pp. 62a-64a.

Having thus ignored the District Court's citation of 49 USC §1421 and erroneously decided that the duties of the FAA were limited to §1354, the First Circuit ruled that duties of "air tower controllers" were "totally distinguishable from the FAA inspectors before us" (p. 46a). Again ignoring 49 USC §1421 and stating that issuance of the Southern Order was not required (p. 47a), the First Circuit nevertheless cited no statute relating to duties of ATC.

The safety duties of the FAA are not and never have been limited to preventing collisions. Indeed, 49 USC §1421, relied upon by the District Court, puts the primary emphasis on eliminating "the possibility of or recurrence of accidents", including recurrence of the Wichita State type disaster which could only be prevented by compliance with the Southern Order. In the present case, the government did not question the genesis of the Southern Order. It was issued pursuant to 49 USC §§1303, 1341 and 1421.[15] §1341(a) makes the Administrator responsible for exercise of all powers and duties of the FAA (p. 59a). 49 USC §1354(a) empowers him to issue orders, rules, regulations and procedures necessary to carry out provisions of the Act (p. 61a). 49 USC §1343(f) authorizes him to employ the necessary agents to carry out the FAA's duties, and to define their authority and duties (p. 60a). 49 USC §1344(d) authorizes him to delegate his statutory powers (p. 61a). Thus, the Southern Order issued by Regional Director Gordon Becker was as effective as if issued by the Administrator, since it is uncontroverted that the Administrator so delegated his powers. Finally, 49 USC §1485(e) states that it "shall be the duty of every person subject to this Act . . . to observe and comply with any order, rule, regulation or certificate issued by the Administrator" (p. 67a). Again, the First Circuit failed to notice this *statutory* duty to comply with the Southern Order; instead it chose to cite 14 CFR 65.45(a), a regulation which requires ATC personnel to perform their duties in accordance with FAA manuals (p. 46a).

[15] All relevant sections of the Federal Aviation Act are set forth in Appendix E, pp. 56a-68a.



Pursuant to these statutory commands, the FAA at its highest level directed that the Southern Region and the other FAA regions conduct mandatory surveillance and warn passengers, as the only effective means of avoiding repetitions of the Wichita State disaster. The Southern Order was not issued "to supplement the safety precautions of private individuals and businesses" as stated by the First Circuit (p. 54a). It was the opposite: an emergency measure designed to protect the public from illegal operators known to disregard vital safety requirements. *The Southern Order was the first and last line of defense for passengers.* Without the warning required by paragraph 7(d), Clemente could not learn of his imminent danger. Like any passenger, he was forced to rely on the FAA's preemption of aviation safety regulation for warning of hazards—a warning that he would never receive from the illegal operator. The natural reliance of the traveling public on the FAA is further enhanced by the statutory requirement that an FAA airworthiness Certificate must be displayed on every civil aircraft, so that it can be seen by crew and passengers; see 49 USC §1423(c), and 14 CFR 91.27. In addition, the trappings of FAA approval are everywhere, since every civil aircraft has an FAA registration number painted on it; every pilot must have some kind of FAA license; and in the present case, a flight plan was filed with the FAA, and a clearance for takeoff was given from an FAA tower, even for an illegal flight by an uncertificated operator.

Just as the FBI agents preempted negotiations with aircraft hijackers in the *Downs* case (see fn. 7, *supra*), and

HEW officials preempted the testing and release of polio vaccine in the *Griffin* case, (see fn. 7, *supra*), so FAA officials preempted the only means of dealing with the dangers in the *Clemente* case: ramp inspection and warning of passengers. In all three cases, the government employees assigned to statutory public safety duties were the only protection available.

The First Circuit (at pp. 40a, 48a) misconstrued the "Good Samaritan" language of *Indian Towing Co.* v. *U. S.*, 350 U.S. 61 (1955). That decision used the Good Samaritan principle as an example of a private activity that was similar to functions undertaken by the Coast Guard, but it did not subject the government's liability to the limitations of the common law Good Samaritan doctrine. The Biblical Good Samaritan was a spur of the moment volunteer, not a government agency or employee assigned to and paid for public safety duties. The First Circuit decision did not specify who was the Good Samaritan: the FAA, which had the statutory duty to prevent accidents, or the FAA employees at San Juan who were attending New Year's Eve parties or were otherwise flouting their own mandatory safety duties. In most FAA negligence decisions, there is no mention of the Good Samaritan doctrine. The few that mention it use it only as an analogy, as this Court did in *Indian Towing*.[16] The plaintiffs were not required to prove reliance according to the Good Samaritan

[16] In Jayson, "Handling Federal Tort Claims", Vol. 1, §214.02, p. 9-55, fn. 26 (1977 ed.), the author cites as examples of cases holding that breach of statutory duties *will* create private actionable rights, two decisions of this Court: *Indian Towing* and *Union Trust*. Mr. Jayson, who argued the *Indian Towing* case for the government, writes there that the argument that the statutory duty was to the public at large rather than to any particular individuals "was pressed in the Government's brief, but was rejected and not mentioned by the Court in its opinion."



doctrine in any of the FAA negligence cases cited in footnotes 1-6, *supra*.

In its discussion of reliance, the First Circuit came to this remarkable conclusion: "It may be that in carrying out internal directives over a period of time, the FAA staff's conduct will engender sufficient justifiable reliance to create an actionable duty of care, but this is fundamentally different than deriving such a duty from the mere issuance of a directive" (p. 50a). In other words, as long as the FAA employees at San Juan continue to flout FAA mandatory safety orders, they will avoid engendering reliance and thus will avoid liability; but if they obey such orders they will thereby create liability![17]

Among its other errors, the First Circuit ignored this Court's decisions in *Indian Towing Co.* v. *U. S.*, 350 U.S. 61 (1955) and *Rayonier* v. *U.S.*, 352 U.S. 315 (1957), by insisting that plaintiffs were required to prove that private persons performed and would be held liable for the same functions as the government (pp. 39a, 40a, 51a). It also confused "duty" with "standard of care", consistently referring to federal law on the question of duty and ignoring the Puerto Rican law which is the source of duty under

[17] If "engendering sufficient justifiable reliance" was really an issue, Clemente and his copassengers were justified in relying upon the Federal Aviation Act itself, rather than a "mere directive" like the Southern Order. 49 USC §1425(b) *requires* the FAA to employ inspectors "charged with the duty" of inspecting aircraft used in air transportation to the extent necessary to determine that such aircraft "are in safe condition and are properly maintained". It further provides that if an FAA inspector finds that any such aircraft is not in condition for safe operation, the aircraft shall be grounded for five days. While the government claims that this provision applies only to "common carriers", there is nothing in the Act that enables the public to make such subtle distinctions. Therefore, Clemente could justifiably have relied upon the FAA to *ground* Rivera's DC-7, instead of merely warning Clemente as required by the Southern Order.

the Tort Claims Act (see Point III, *infra*). The District Court properly held that "in violating its own orders, the FAA demonstrated a failure to exercise due care" (p. 26a), but the First Circuit never addressed the question of standard of care.

## POINT II

**The First Circuit's Decision Is in Conflict With the Constitution and Decisions of This Court, in That It Makes a Legislative Policy Decision Concerning the Effects of Tort Liability Upon Safety Regulation.**

During oral argument and in its opinion (pp. 43a, 54a), the First Circuit revealed the reasoning behind its unique decision: that imposition of tort liability would "have an unfortunate inhibiting effect on government safety measures" (p. 54a). Thus, the First Circuit has usurped the authority of Congress to make such policy decisions under Article 1, Section 1 of the Constitution. In ruling on similar questions arising under the Tort Claims Act, this Court has held that such decisions are for Congress, not for the courts.[18] In its consideration of this policy question, the First Circuit also concluded that "the surrender of sovereign immunity by the government should be interpreted narrowly" (p. 43a), citing no authority. This is contrary to many decisions of this Court.[19]

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[18] *U.S.* v. *Gilman*, 347 U.S. 507, 510-511 (1954); *Indian Towing Co.* v. *U.S.*, 350 U.S. 61, 69 (1955); *Rayonier* v. *U.S.*, 352 U.S. 315, 319-320 (1957).

[19] *Dalehite* v. *U.S.*, 346 U.S. 15, 31 (1953); *Indian Towing Co.* v. *U.S.*, 350 U.S. 61, 68-69 (1955); *Rayonier Inc.* v. *U.S.*, 353 U.S. 315, 319-320 (1957); *U.S.* v. *Aetna Surety Co.*, 338 U.S. 366, 383 (1949); *U.S.* v. *Yellow Cab Co.*, 340 U.S. 543, 554-555 (1951); *U.S.* v. *Muniz*, 374 U.S. 150, 152, 165-166 (1963).



The First Circuit cited no authority for exclusion of liability in cases where the court suspects a safety problem. There is no such authority in the Tort Claims Act, its legislative history, or reported cases, for a good reason: the courts do not have the facilities to determine such policy questions. No evidence was or could be presented on this question in the District Court. It was first raised as an argument in the government's appellate brief. Plaintiff responded by pointing out that after the District Court's finding of liability, the Southern Order was *not* rescinded; indeed, the opposite occurred: the FAA stepped up its enforcement of the order, resulting (according to newspaper reports) in the grounding of 42 large aircraft and 30 pilots who posed dangers to public safety. The government's counsel admitted during oral argument that the Southern Order remained in effect. He stated that the newspaper figures on the number of aircraft and pilots grounded were not accurate, but he did not submit any other figures.[20]

Since government safety officials are not required to contribute to judgments against the United States, and since their job advancement is dependent upon performance of statutory safety duties, it is not apparent how government liability for flouting the Southern Order would inhibit FAA safety performance. It was predictable that the opposite result would occur, as it did. The fact that newspaper reports and arguments of counsel were the only

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[20] In recent Congressional testimony, FAA officials confirmed that during 1977, their safety policy shifted from attacking the legality of leases to stricter surveillance of airworthiness and crew capability, and that this shift resulted in grounding a number of illegal and unsafe operations, especially in the Southern Region; see Hearings on "Airline Deregulation and Aviation Safety", House of Representatives, Committee on Government Operations, 95th Congress, Sept. 8 and 9, 1977, at p. 55. At the same hearings, FAA officials confirmed that inspection and surveillance are primary safety functions of the FAA (*id.* at pp. 59, 73-74, 237, 256-259, 333).

materials available to the First Circuit, demonstrates the soundness of this Court's holdings that such policy questions must be decided by Congress rather than the courts.

## POINT III

**The First Circuit Erred by Refusing to Enforce the Civil Code of Puerto Rico and by Refusing to Follow Decisions of the Supreme Court of Puerto Rico Construing That Code, Despite Past Admonitions by This Court.**

While the First Circuit stated that Puerto Rican law was controlling on the issue of legal duty (p. 37a), it did not apply that law. Even though the District Court explained the very broad basis for tort liability under the Civil Code of Puerto Rico (pp. 28a- 29a), the First Circuit refused to recognize that Puerto Rico, as a civil law jurisdiction, has a different concept of legal duty than do common law jurisdictions. As stated in Article 1802 of the Civil Code (App. G, p. 71a) and in many decisions of the Supreme Court of Puerto Rico, duty in Puerto Rican tort cases arises "without any preceding juridical relation except for the generic duty, common to all men, of not causing damage to another"; see *Correa* v. *Puerto Rico Water & Resources Authority,* 83 P.R.R. 139, 149 (1961), and the other cases cited in footnote 2 of the First Circuit's decision (p. 37a). This concept of duty to society is extended to the commonwealth itself, which is liable for negligently caused damage to the same extent as private persons, under section 1803 of the Civil Code (p. 71a).

This does not mean liability without fault. The cases cited above establish three requirements for liability: negligence, causal relation, and damages. There is also a requirement of foreseeability, which explains why Puerto



Rican courts often reach the same results as common law courts even though no concept of specific preexisting duty to the plaintiff is used.[21] Thus, it is not surprising that the leading Puerto Rican cases dealing with duty (p. 37a, fn.2) "involve relationships that would create liability under traditional tort doctrines". They also cover situations analogous to the present case. For example, in *Gines* v. *Aqueduct & Sewer Authority,* 86 P.R.R. 490, 496 (1962), defendant was held liable for plaintiff's injuries even though they were inflicted by an illegal act of a third party, the court holding that the basis for such liability in Puerto Rico is foreseeability. In the *Clemente* case, the most clearly foreseeable result of the failure of FAA inspectors to warn the passengers was that they would board the plane and fly to their deaths ignorant of the danger.

This Court has held that the First Circuit must accept the interpretation given Puerto Rican statutes by that commonwealth's Supreme Court, unless it is "inescapably wrong"; see *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41 (1970); *Bonet* v. *Texas Co.,* 308 U.S. 463 (1940); *Bonet* v. *Yabucoa,* 306 U.S. 505 (1939). Far from finding the Puerto Rican Supreme Court's interpretation of Article 1802 of the Civil Code "inescapably wrong", the First Circuit completely disregarded that interpretation and substituted its own, even using such common law devices as the Restatement of Torts (pp. 41a-42a) and the Good Samaritan doctrine (p. 48a) which have no place in civil law jurisprudence. Indeed, the First Circuit based most of its discussion of

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[21] In *Salva Matos* v. *Diaz Const. Corp.,* 95 P.R.R. 880, 884 (1968), the Supreme Court of Puerto Rico held that their "positive law states that no one shall be liable for events which cannot be foreseen, or which having been foreseen are inevitable" (citing Civil Code §1058, 31 L.P.R.A. §3022.) The District Court in *Clemente* found that the existence of the Southern Order in substantially the same form since April 5, 1971 "clearly brings forth the foreseeability of the present situation" (p. 32a).

duty on federal law relating to the FAA rather than on Puerto Rican law, thereby confusing *duty* with *standard of care*, the "reasonable man" standard that may be determined from federal statutes, regulations, orders, manuals, and court decisions.

## POINT IV

**The First Circuit's Unfounded Reversal of the Puerto Rican District Court's Finding of Liability Constitutes a Gross Miscarriage of Justice Involving the Death of Roberto Clemente, an Important Public Figure. It Will Bring the Federal Court System Into Disrepute Unless This Court Exercises Its Power of Supervision Under Rule 19(B).**

Petitioners realize that this Court does not have time to correct all the errors of lower federal courts. However, the many errors of the First Circuit in the present case will become notorious to millions of Puerto Rican Americans who idolized Roberto Clemente, not just as a baseball star, but as a great humanitarian—indeed, as Puerto Rico's leading Good Samaritan. Just prior to his death, the whole commonwealth learned of his last mission of mercy, the relief flight to Nicaragua. He sacrificed his own Christmas holidays, and through the media he rallied the people of Puerto Rico, poor enough themselves, to donate life-saving supplies for the Nicaraguan earthquake victims. His untimely death shook the entire commonwealth, depriving all (especially the young) of a figure to emulate. Then the shocking details of the FAA's admitted disregard of its own safety order became known to the Puerto Rican public through media coverage of the trial and the District Court's decision.

The First Circuit apparently decided that the District Court's decision would create safety problems—a decision



beyond its constitutional power, and completely wrong on the facts. Then the First Circuit proceeded to dismantle the carefully reasoned decision of the Puerto Rican District Court, piling error upon error in the process. The First Circuit called the Southern Order "gratuitous"; it ignored all the legislative history and court decisions interpreting the Tort Claims Act and the Federal Aviation Act; it disregarded the statutes and decisions of Puerto Rico relating to duty; and after 30 years of Tort Claims litigation, it wrote a new duty rule that lowered the widow and children of Roberto Clemente beneath the status of federal prisoners. It stands as a gross miscarriage of justice that will shake the faith of Puerto Rican Americans and others in the federal judicial system. Such a decision cries out for exercise of this Court's power of supervision under its Rule 19(b).

## POINT V

**The First Circuit Erred in Describing the Southern Order as "Discretionary", and in Its Questioning of the Level At Which the Southern Order Was Adopted.**

While the First Circuit decision stated that the discretionary function exception of 28 USC §2680(a) was not reached (p. 53a), the decision called the Southern Order "discretionary" in several places (pp. 43a, 46a-47a). This error was based upon the First Circuit's selection of the wrong statute (49 USC §1354 instead of 49 USC §1421) as the basis for issuance of the Southern Order. It was also founded on erroneous questioning of the "level" of the FAA that originated the Southern Order (pp. 43a, fn. 8; 50a; 54a), even though the government never raised such question and there was uncontroverted evidence that it originated at "FS-1", the top level of the FAA in Washington,

and that similar orders were promulgated in all other FAA regions. Moreover, the First Circuit's finding that the Southern Order was merely "internal" in its effect (pp. 40a, 53a), and its holdings as to the legal duties created by the Southern Order, are so closely related to the discretionary function exception that this Court should include the discretionary function question among those presented and to be reviewed.

## CONCLUSION

**This Is the Rare Case That Involves Each and Every Reason for Review Set Forth in Supreme Court Rule 19(b). It Involves Important Federal Issues Never Decided by This Court, Which Affect Thousands of Pending and Future Cases. Therefore, Certiorari Should Be Granted.**

Respectfully submitted,

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# APPENDIX

## Appendix A

## Opinion and Order of U.S. District Court, District of Puerto Rico, dated November 24, 1976

CLEMENTE ET AL. v. UNITED STATES OF AMERICA

Cite as 422 F. Supp. 564 (1976)

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VERA ZABALA CLEMENTE *et al.*,

*Plaintiffs,*

v.

THE UNITED STATES OF AMERICA,

*Defendant.*

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Civ. Nos. 778-73, 779-73, 999-73, 1000-73 and 1096-73.

United States District Court,
D. Puerto Rico.
Nov. 24, 1976.

SPEISER, KRAUSE & MADOLE, Washington, D. C., *for Plaintiffs.*

MICHAEL J. PANGIA, Aviation Unit, U. S. Dept. of Justice, Washington, D. C., Julio Morales Sanchez, U. S. Atty., San Juan, P. R., *for Defendant.*

OPINION AND ORDER

TORRUELLA, *District Judge.*

The present matter involves consolidated actions for wrongful death filed pursuant to the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2671 et seq.), against De-

*Appendix A*

fendant United States of America for the alleged negligence of employees of the Federal Aviation Administration (F.A.A.). We assume jurisdiction pursuant to said statute.

Plaintiffs are the duly qualified personal representatives and/or next of kin of decedents Roberto Clemente, Angel Lozano and Francisco Matias, all passengers who lost their lives as result of the crash of a Douglas DC-7 type aircraft on thet evening of December 31, 1972 in Carolina, Puerto Rico. Aboard this aircraft, in addition to Plaintiffs' decedents, were Arthur S. Rivera, the owner of the airplane who was performing duties as copilot, and Jerry C. Hill, the pilot-in-command, both of whom were also killed.

The cause of this accident, and the causal link, if any, to actions or inactions of Defendant United States of America, is one of two major issues developed in this case. The second question is presented by way of Defendant's defense[1] to the effect that the conduct claimed by Plaintiffs as establishing negligence falls within the "discretionary function" exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a).[2]

The aircraft in question was purchased by Mr. Rivera in Miami, Florida on July 12, 1972. It was powered by four Curtiss Wright 988, TC 18 EA 1, Model R-3350 engines, each with Hamilton Standard 34 E 60 propellers. The

[1] *United States* v. *Muñiz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); *Stewart* v. *United States*, 199 F.2d 517 (C.A. 7, 1952).

[2] "The provisions of this chapter and section 1346(b) of this Title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."



*Appendix A*

maximum gross take-off weight allowable for a DC-7 CF is 144,750 pounds, provided certain approved modifications are effectuated, and if a device known as an "auto-feather" is used in the particular flight.

In September, 1972 the aircraft in question was ferried from Miami to San Juan. It arrived with its No. 3 propeller "feathered."[3]

On December 2, 1972, while Mr. Rivera was taxiing his airplane at the San Juan International Airport, there was a loss of hydraulic power causing a malfunctioning of the brake and steering systems of the craft. As a result the airplane went off the apron into a water-filled concrete ditch. Prior to hitting the ditch power was shut off the engines by Mr. Rivera, but nevertheless the blades in No. 2 and 3 engines hit "a hard object" before coming to a stop. The following damage was caused to the aircraft: blown starboard outboard main and nose tires, damaged No. 2 and 3 propeller blades, starboard gear and hydraulic lines and bracket broken, No. 3 engine cooler scoop damaged.

This incident came to the attention of F.A.A. airworthiness inspector Juan Villafañe, who was at the airport investigating official matters. He questioned Mr. Rivera concerning his intentions regarding the damage to his aircraft. Mr. Rivera indicated that he would carry out the necessary repairs. Mr. Villafañe took no further action.

Another F.A.A. airworthiness inspector, Jesús Negrón Ocasio who by chance was unofficially present at the airport on the day of this incident, was assigned the investigation of this matter. Mr. Negrón Ocasio was assisted in the

[3] "Feathering" a propeller involves the changing of its angle of pitch. The propeller is feathered by manipulating controls in the cockpit, which in turn act upon mechanisms in the engine and in the propeller hub.

investigation by Vernon Haynes, an F.A.A. general aviation maintenance inspector.[4]

In the days that followed, repairs were performed by one of the decedents, Francisco Matías, together with Rafael Delgado Cintrón, both of whom were airframe and powerplant mechanics duly authorized by the F.A.A. They checked the engine mounts as well as the sump plugs and oil filters and found them to be in good condition. No indication of shaft misalignment was found. The damaged propellers were replaced by new ones and the engines then run for three hours. Both No. 2 and 3 engines operated within permissible limits, and no indication was found of engine failure or malfunction. Thereafter Messrs. Matías and Delgado Cintrón returned the aircraft to service by the signing of the maintenance logs.[5]

On December 23, 1972 a major disaster occurred in the Republic of Nicaragua in the form of a devastating earthquake. Shortly after news of this catastrophe was received

[4] This investigation had not been completed when the present accident occurred on December 31, 1972. However, Mr. Negrón Ocasio had already concluded that a violation was indicated against Mr. Rivera for careless and wreckless operation of an aircraft. This opinion was verbally communicated by Mr. Negrón Ocasio to Leonard Davis, Chief of the F.A.A. Flight Standards District Office in San Juan, and to his immediate supervisor, Leonard Davis, the principal F.A.A. air carrier operations inspector.

Prior to this, in 1971, the F.A.A. had issued an emergency order revoking Mr. Rivera's pilot certificate for 66 violations of 14 C.F.R. 121.-3(f), i.e., using a large aircraft for the transportation of persons or property for compensation or hire without a certificate under 14 CFR Part 121. On Appeal the National Transportation Safety Board suspended Mr. Rivera's pilot certificate for 180 days. Messrs. Davis, Villafañe, Negrón Ocasio, Haynes and Coupland, participated in or knew of these enforcement proceedings against Mr. Rivera.

[5] This is the method specified by F.A.A. regulations. 14 C.F.R. 43.7(b), 43.9. No prior F.A.A. approval is required.





in Puerto Rico, Roberto Clemente, who was a well known major league baseball player from Puerto Rico, proceeded to organize a relief committee for its victims.[6] Mainly through Mr. Clemente's personal efforts this committee was able almost immediately to gather various emergency supplies, and within a few days of the earthquake, to airlift three airplane loads to Managua, Nicaragua.

The momentum of the relief effort was such when the last of these flights was ready to leave on December 30th, there was more cargo available than could be loaded. At this point, Mr. Clemente, who had gone to the airport to see this flight off, was approached by Mr. Rivera.

Mr. Rivera introduced himself as the president of American Air Express Co.[7] and as having a cargo plane available which was capable of transporting the remaining relief material to Nicaragua. Mr. Clemente inspected the cargo plane and agreed on $4,000 as the charter fee to be paid upon the return of the airplane to Puerto Rico. Mr. Rivera was to supply crew and fuel for the enterprise.[8]

Federal Air Regulations in effect at that time required that when used in a commercial operation, a DC-7 aircraft

[6] Mr. Clemente had been in Nicaragua shortly before the earthquake while coaching a baseball team from Puerto Rico.

[7] Mr. Rivera had been advertising his airplane for lease in the local newspaper under this company name. This was known at the time by F.A.A. personnel in San Juan, including Messrs. Negrón Ocasio, Villafañe, Davis and Haynes. The advertisement made no mention of providing crew and/or fuel.

[8] The type of lease in which the operational control is in the lessor is referred to in the industry as a "wet lease." Such a lessor is operating for hire and must therefore meet the certification and other requirements of 14 C.F.R. Part 121. See footnote 4 herein. Mr. Rivera did not meet these requirements prior to the flight in question and was therefore operating illegally. 14 C.F.R. 121.3, 121.6(a). The F.A.A. personnel in San Juan was unaware of this arrangement.

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be crewed by a duly qualified pilot-in-command, copilot and flight engineer.[9]

Mr. Rivera proceeded to hire Jerry C. Hill as the pilot-in-command of the flight. Mr. Hill held an airline transport pilot's certificate issued by the F.A.A. with type ratings in DC-4, DC-6, DC-7 and C-46 aircraft and had approximately 12,440 hours of flying time, of which approximately 3,000 hours were in DC-7 type aircraft, with 2,000 hours as pilot-in-command. He had last flown a DC-7 as pilot-in-command on November 10, 1972.

Mr. Rivera decided to assume the duties of copilot for the flight. He held a commercial pilot's certificate with an instrument and single and multi-engine land airplane rating issued by the F.A.A., and a type rating in Douglas DC-3 aircraft. Mr. Rivera had approximately 1900 hours of flying time of which approximately 6 hours had been entered in DC-7 type airplanes. He was not certified by the F.A.A. to perform duties as a copilot in this type of aircraft.

Mr. Rivera attempted to seek the services of a flight engineer to accompany the flight, but was unable to do so.[10]

During the 30th and 31st of December, 1972 various activities preparatory to the mercy mission centered around the DC-7 at the airport. While the aircraft was loaded with the cargo, Messrs. Matías and Delgado Cintrón at various times performed last minute maintenance check-ups, including the testing of the engines and corresponding instruments.

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[9] 14 C.F.R. 121.385(b), (c)(3); 121.387.

[10] Mr. Matías, who as previously stated was board the aircraft when it crashed, was not a rated flight engineer, nor is there any indication that he was acting as such in this flight.



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The loading was completed on December 31st. Based upon post-accident investigation of a fuel receipt and customs declaration,[11] the gross take-off weight of the subject aircraft was approximately 148,943 pounds, or approximately 4,193 pounds in excess of its maximum allowable gross takeoff weight.

During the morning of December 31st, the pilot of the aircraft, Mr. Hill, filed a flight plan with the F.A.A. in San Juan.

At approximately 9:11 P.M. of that day, the aircraft with all passengers and crew aboard taxied to Runway 7 on its way to meet its fate. It had not been flown since its arrival from Miami in September.

After engine run-up by the crew, the flight was cleared for take-off at 9:20:30 P.M. The weather was good, with visibility at 10 miles and scattered cloud cover at 2200 feet.

On takeoff, the aircraft took an exceptionally long take-off roll and gained very little altitude. A left turn was commenced towards the North, after which, at 9:23:15 P.M., the San Juan Tower received the following transmission: "N500AE coming back around." Thereafter, the aircraft crashed into the Atlantic Ocean at a point approximately 1.5 miles off shore, and 2.5 miles on the 040 degree radial from the western end of Runway 25.[12]

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[11] The actual weight and balance computation made by the crew was not found.

[12] The closest we have to an eye witness of the crash is Mr. Delgado Cintrón, who was present at take off. He testified that on take off the engines sounded even and normal. At the end of the take-off roll he heard three backfires and a different engine sound, caused by a change in revolutions. After the aircraft was out of sight he heard an explosion.

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The wreckage site was not discovered until January 4, 1973 due to extremely rough surface conditions and poor underwater visibility.

On or after January 7th, divers from a United States Navy ship reported that the aircraft wreckage was scattered throughout the bottom of the ocean at a depth of 100 to 130 feet, in an area of approximately 4 acres. The aircraft was broken into several sections, most of them badly crushed or demolished. Both wings were separated from the fuselage. The cockpit area forward of the main junction box was destroyed and the instrument panel and mechanical controls missing. The nose gear assembly was retracted. All four engines were accounted for, but none of them were found attached to the wing structure. Two of the engines were together at a distance of approximately 200 feet from the right wing, which itself was upside down on the left side of a fuselage section.

Three of the engines were in fact recovered from the ocean floor on January 11, 1973. Among the engines recovered with Nos. 2 and 3.[13] The propeller of the No. 2 engine was "feathered" thus indicating that there had been engine failure at some point before the crash. The magnetic sump plug of No. 3 engine had pieces of broken cylinder rings, however, the rings were found intact in the cylinders of this engine.

Plaintiffs' theory of recovery is that pursuant to the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq., and the regulations and orders promulgated thereunder, the F.A.A. owed a duty to Plaintiffs and Plaintiffs' decedents

[13] Although the engine serial numbers had been removed as souvenirs by the recovery crew, it was possible to establish that these were the engines salvaged because they have hydraulic pumps, while Nos. 1 and 4 do not.



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to promote flight safety, which duty was breached by the failure of the F.A.A. to take various actions against Mr. Rivera, which actions would have stopped, or rendered safe, the fatal flight. Stated in more detail, Plaintiffs' contentions are based on the following proposed causal sequence: the taxi incident of December 2, 1972 caused a "sudden stoppage" [14] of No. 2 and 3 engines; as a result of its investigation of this incident, the F.A.A. should then have issued a "Condition Notice of Unairworthy Aircraft,[15] and should have requested the Regional Counsel of the Southern Region of the F.A.A. to order the revocation of the airworthiness certificate of the airplane, all of which allegedly would have grounded the aircraft; thereafter the F.A.A. should have instituted follow-up procedures of inspection and surveillance to prevent the use of the air craft until such time as the effects of the sudden stoppage were corrected; as part of these follow-up procedures, when Mr. Rivera leased the aircraft to Mr. Clemente, the F.A.A. should have required that Mr. Rivera comply with the Federal Aviation Regulations (14 C.F.R. Part 121) before holding himself out for hire under a "wet lease"; additionally, the F.A.A. San Juan Office, should have enforced SO ORDER 8430.20C against this aircraft, in which case they would have discovered from the maintenance logs that the aircraft was unairworthy, that it had an improper registration number, that it did not have proper weight and balance, and that it did not have a qualified crew, and

[14] "Sudden stoppage" is a term of art which applies to a situation wherein an engine is abruptly and violently ceased while under substantial power by reason of the propeller striking a solid object, and which stoppage causes internal damage to the engine.

[15] This is a disciplinary type notice that can be issued administratively pursuant to F.A.A. Compliance and enforcement Policy Order 1000.9A, to obtain compliance with safety violations.

thereafter they would have coordinated within the F.A.A. and with other governmental agencies to deny the aircraft flight clearance, and have notified Plaintiffs' decedents of the aforementioned deficiencies; and that all of these inactions contributed to, and resulted in the December 31st tragedy.

In substance, Defendant responds that there was no legal duty toward Plaintiffs' decedents to discover or anticipate acts which might result in a violation of Federal Regulations by private persons charged with compliance therewith, or to take enforcement action against said persons once such acts were known to Defendant. Furthermore, Defendant claims a lack of causal connection between any possible duty imposed upon it by law, or any alleged failure by Defendant to act in consonance with this duty, to the December 31st crash in which Plaintiffs' decedents lost their lives.

We thus plunge into the legal quagmires of causation and of the discretionary function exception of the Federal Tort Claims Act.

It is axiomatic that an essential element of Plaintiffs' cause of action is that there be some reasonable connection between the act or omission of the Defendant and the damage which Plaintiffs have suffered.[16] Legal responsibility must be limited to those causes which are so closely associated with the result, and are of such significance there-

[16] On the subject of causation generally, see Prosser, *Law of Torts*, Chapter 7, "Proximate Causes", Fourth Edition, 1971. Of course, under the Federal Tort Claims Act (28 U.S.C. § 1346(b)) we are required to look to the locus of the tort for the substantive law to be applied. *Richards* v. *United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).



to, as to justify the imposition of liability. The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing about the result. A mere possibility of such causation is not enough. Plaintiff has the burden of proof of establishing causation by a preponderance of the evidence. *Rivera* v. *Dunscombe*, 73 P.R.R. 764 (1952). If the matter remains one of pure speculation or conjecture, or if the probabilities are at best evenly balanced, then Plaintiff's burden has not been met. In this jurisdiction a defendant is responsible if his negligence is *a* proximate cause of the injury, even if it is not the *only* proximate cause of the damage. *Ginés Meléndez* v. *Autoridad de Acueductos*, 86 P.R.R. 490 (1962); *Viuda de Andino* v. *Autoridad de Fuentes Fluviales*, 93 P.R.R. 168 (1966).

Once it is established that a defendant's conduct has in fact been one of the causes of plaintiff's injury, there remains the question of whether the defendant should be held legally responsible for what he has caused. *Pabón Escabí* v. *Axtmayer*, 90 PRR 20 (1964). This, unlike the fact of causation, is essentially an issue of law. This is a question of whether the defendant is under any duty to the plaintiff, and if there is such duty, whether it includes protection against such consequences as have been suffered by plaintiff.

Our point of departure is the so-called "sudden stoppage" incident of December 2, 1972. In this respect we cannot conclude that Plaintiffs have met their burden of establishing this event as a material element of the accident here in question. Starting with the end result, that is, Nos. 2 and 3 engines after they were recovered, there is no credible evidence to establish that these engines at that time man-

ifested any sign of having suffered a prior "sudden stoppage", in the sense of having suffered internal damage. Most indicative of this is the fact that the cylinder rings in these engines were intact. Additionally, we should note that there is no credible fact (as distinguished from conclusion) that would point to an engine failure caused by a prior "sudden stoppage." Although when recovered No. 2 engine was found feathered, which as previously stated is indicative of engine failure, upon inspection no internal damage compatible with prior "suddent stoppage" was discovered. To this we must add that after December 2, the aircraft was inspected and repaired by certified mechanics under circumstances which would seem to have been sufficient to permit discovery of serious internal damage. Thereafter these persons (one of whom was aboard the ill-fated flight) returned the aircraft to service, it being their opinion that the aircraft was airworthy. This is the procedure contemplated in the Regulation of the F.A.A. and no prior approval from this agency is required by law.[17] We therefore fail to see how, even if "sudden stoppage" had occurred on December 2, any possible negligence by these mechanics in improperly returning the aircraft to service, can be imputed upon the F.A.A.

From the evidence adduced at the trial we are of the opinion that the failure of No. 2 engine was caused by an "overboosting" of the engine upon takeoff. This in turn was caused by the lack of a proper flight crew.

The inadequacy of the flight crew, in particular the lack of a trained copilot and the total absence of a flight engineer (both crew members whose functions are of prime importance in preventing "overboosting"), together with

[17] See footnote 5, supra.



a gross take-off weight which exceeded the maximum allowable limits by more than two tons, created a situation wherein ". . . for all practical purposes the Captain was flying solo in emergency conditions." [18]

We must inquire as to whether the Defendant owed a duty toward Plaintiffs' decedents relevant to the creation of this situation.

It appears to us to be undisputable that by the enactment of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq., Congress intended to impose a duty on the F.A.A. to promote maximum safety in the use of the Nation's airspace. 49 U.S.C. §§ 1302, 1303, 1421; *Arney* v. *U.S.*, 479 F.2d 653 (C.A. 9, 1973); *Air Line Pilots Ass'n Int'l* v. *Quesada,* 276 F.2d 892 (C.A. 2, 1960); *Rosenhan* v. *U.S.,* 131 F. 932 (C.A. 10, 1942), cert. denied 318 U.S. 790, 63 S.Ct. 993, 87 L.Ed. 1156 (1942); *Doe* v. *Dept. of Transp. F.A.A.,* 412 F.2d 674 (C.A. 8, 1969). We are concerned, however, with the nature and extent of this duty as applied to Plaintiff's decedents.

In the exercise of duties established by the above mentioned Statute, the Director of the Southern Region of the F.A.A. on September 25, 1972 issued Order SO8430.-20C entitled "Continuous Surveillance of Large and Turbined Powered Aircraft." At least by October 31, 1972 this Order was being put into effect by the Flight Standards District Office in San Juan.[19]

[18] Although we have taken this statement from the F.A.A. accident report dated February 22, 1973 (Plaintiff's exhibit 2.1), said report is not the basis for any finding in this decision.

[19] The San Juan Office is within this Southern Region of the F.A.A. This order was in substance a repetition of Orders SO8430.20A and SO8430.20B which had previously been issued on April 5, 1971 and August 2, 1971, respectively.

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This Order, in its relevant parts, reads as follows:

"1. PURPOSE. This order outlines procedures for a continuous surveillance program of large and turbine powered airplanes. . . .

2. DISTRIBUTION. This order requires action by Air Traffic field facilities and General Aviation, Air Carrier, and Flight Standards District Offices. . . .

3. ACTION. Flight Standards ACDOs, GADOs, and FSDO will coordinate with Air Traffic facilities to establish the method for notification of arriving and departing large aircraft and turbine powered aircraft that cannot be readily identified as bona fide air carriers, commercial carriers, travel clubs, air taxis, or executive operators. Representative of these are: . . . DC-7 . . . To accomplish this program effectively, consideration should be given to night and weekend surveillance with the use of irregular or modified work week, as necessary.

. . . . .

5. BACKGROUND. Several accidents/incidents involving noncertificated operators disclosed that these operators were transporting specialized groups for compensation or hire without an appropriate operating certificate, and little regard to airworthiness safety standards on their aircraft. During the special 60 days surveillance program completed by Flight Standards offices, it was discovered that a considerable number of such noncertificated operators of large aircraft and turbine powered aircraft are engaged in passenger and cargo commercial



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operations contrary to applicable provisions of either part 121 or 135 of the Federal Aviation Regulations.

6. SURVEILLANCE PROCEDURES. ACDOs GADOs, and FSDO will provide continuous surveillance of large and turbine powered aircraft to determine noncompliance of Federal Aviation Regulations. At least the following actions will be taken:

a. Contact noncertificated operators of large and turbine powered aircraft within your area of responsibility, and advise them of certification requirements, as appropriate.

b. Conduct airport surveys to determine the number, type and status of large and turbine powered aircraft on airports. . . .

c. Continue efforts to encourage . . . specialized groups to contact the nearest Flight Standards office prior to engaging operator for air transportation.

d. In cases when information is known in advance of flights:

(1) Interview operator/owner, flight crews, and others including passengers to determine whether the proposed flight is a commercial or private operation.

(2) If noncompliance with applicable regulations is indicated, advise the operator and flight crew accordingly.

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7. On Site Inspection

a. Conduct ramp inspection with at least the following emphasis to determine that the crew and operator comply with regulatory requirements for safety of flight.

. . . . .

(6) Airworthiness of the aircraft.

. . . . .

(8) Weight and Balance

. . . . .

(10) Pilot qualification . . .

. . . . .

d. . . . Clear indication of alleged illegal flight should be made known to flight crew and persons chartering the service.

8. Enforcement Investigation Processing

A. When noncompliance of any kind is found, investigation and violation action shall be given priority second only to aircraft accident investigation . . ."

It would seem that SO 84O30.20C is applicable to the flight here in question, and that Plaintiffs' decedents are within the class of persons sought to be protected thereby. Furthermore, we are of the opinion that adherence by the San Juan F.A.A. personnel to the procedures dictated therein would have in all probability resulted in the saving of plaintiffs' decedents' lives not, as is alleged by Plaintiffs, because the flight could have been physically or legally pre-



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vented from departing,[20] but because most assuredly upon the performance of a ramp inspection of the aircraft the lack of a proper crew and the gross over weight would have become apparent to the inspecting authority. Upon such a "clear indication of illegal [and unsafe] flight" being made known to Plaintiffs' decedents, it is reasonable to presume that they would not have participated as passengers in this dubious enterprise, (*Gercey* v. *U. S.*, 540 F.2d 536, at page 538, No. 76-1137 (C.A. 1, 1976) and in any event, if after such a warning they would have chosen to act against normal instincts of self preservation, having thus assumed the risks inherent in such actions, they and their successors would be in a tenuous position to legally complain of the predictable results.

Considering the above, it would normally be incumbent upon us to proceed to conclude without further ado that the misfeasance of the San Juan F.A.A. personnel in failing to follow their own regulations, was negligence and was a contributing factor to the events here in dispute. *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (C.A. 2, 1967); *Hoffman* v. *United States*, 398 F.Supp. 530 (E.D.Mich., 1975); *Pennsylvania Railroad Co.* v. *United States*, 124 F.Supp. 52 (D.N.J., 1954).

However, Defendant raises a defense which requires further analysis and presents issues of a factual and legal nature. The substance of Defendant's argument is as follows: the method and manner of enforcing SO 843.20C by

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[20] From the testimony and documentary evidence we are unconvinced that the enforcement machinery available could have effectively been brought to bear. Furthermore failure to take such enforcement action is not actionable. *Smith* v. *United States*, 375 F.2d 243 (C.A. 5, 1967), cert. denied 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (1967).

the San Juan Flight Standards Office is a policy determination which the Director of that office is free to make based upon such factors as funds and available manpower; thus the failure to discover any lawbreaker by reason of the manner in which the Director has determined the order should be administered, does not give rise to any cause of action on behalf of the victims of the lawbreaker, because that policy decision and its consequences are protected by the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a).

In support of this proposition Defendant presented testimony to the effect that the issuing authority promulgated this order as being discretionary rather than mandatory on the local offices, and that pursuant to this interpretation and the exigencies of personnel, the San Juan Director decided to apply the order only to arriving aircraft rather than to arriving and departing aircraft as stated in the order.

The second part of Section 2680(a) excluded claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." See generally, Jayson, "Personal Injury, Handling Federal Tort Claims", Vol. 2, Sec. 245 et seq.

The leading case in this matter is *Dalehite* v. *United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). That case involved death, personal injury, and property damage claims resulting from an explosion of fertilizer known as "FGAN" aboard a vessel in the harbor at Texas City, Texas. The FGAN was produced pursuant to a government program designed to increase food supplies in occupied countries after World War II. The District Court



made findings of negligence with regards to the manufacture, bagging, labeling, and shipment of a dangerous product, and in failing to give notice of its dangerous nature to the persons handling such products. It further concluded that the Coast Guard was negligent in policing the shipboard loading of the dangerous substance and in fighting the fire which later developed. The Court of Appeals reversed[21] and its action was affirmed by the Supreme Court.

The opinion of the Court first deals with the nature of this exclusionary provision. The Court states that "[o]ne only need read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions."[22] Following this proposition, the Court continues:[23]

> ". . . It excepts acts of discretion in the performance of governmental functions or duty 'whether or not the discretion involved be abused.' Not only agencies of government are covered but all employees exercising discretion. It is clear that the just-quoted clause as to abuse connotes both negligence and wrongful acts in the exercise of the discretion because the Act itself covers only 'negligent or wrongful act or omission of any employee', 'within the scope of his office' 'where thte United States, if a private person, would be liable.' . . . The exercise of discretion could not be abused without negligence or a wrongful act. The Committee reports . . . show this . . .

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[21] *In Re Texas City Disaster Litigation,* 197 F.2d 771 (C.A. 5, 1952).

[22] At 346 U.S. page 32, 73 S.Ct. page 966.

[23] Id., at pages 33-34, 73 S.Ct. page 966.

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. . . The 'discretion' protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law."

In discussing the scope of this exception the Court said:[24]

". . . It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. *Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of subordinates in carrying out the operations of government *in accordance with official directions* cannot be actionable. If it were not so, the protection of Sec. 2860(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion." (Emphasis supplied).

Finally, regarding the alleged negligence of the Coast Guard in failing to prevent the fire by regulating the storage or loading of the FGAN in a different fashion, the Court held that the power to regulate was discretionary and "classically within the exception." [25]

[24] Id., at pages 35-36, 73 S.Ct. at page 968.
[25] Id., at page 43, 73 S.Ct. at page 971.



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Several cases decided by the various Federal courts since *Dalehite* may further aid in understanding the exception. In *Brooks* v. *United States*, 152 F.Supp. 535 (S.D. N.Y., 1957), a claim based upon the Government's failure to prosecute was dismissed pursuant to this provision. Likewise, in *Westchester Fire Insurance Co.* v. *Farrell's Dock & Term. Co.*, 152 F.Supp. 97 (D.Mass., 1957), it was held that the failure of the Government to discover and prosecute the persons responsible for spreading oil on navigable waters, which oil caught fire and damaged claimant, was not actionable because it was the exercise of a discretionary function. See also *Smith* v. *United States*, 375 F.2d 243 (C.A. 5, 1967), cert. denied 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (1967); *Goodwill Industries of El Paso* v. *United States*, 218 F.2d 270 (C.A. 5, 1954); Cf. *Gercey* v. *United States*, supra (decided under the Suits in Admiralty Act, 46 U.S.C. § 741 et seq., wherein it was held that in the absence of a specific Congressional mandate, there exists no duty upon the Coast Guard to establish a follow up system to prevent the use by the public of a vessel which the Coast Guard refused to certify, and which it knew was unsafe).[26]

In juxtaposition Plaintiffs place reliance upon another line of cases, the leading one being *Indian Towing Co.* v. *United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).[27] In that particular case the Coast Guard because of improper maintenance, permitted the light to go out in one of the lighthouses it operated. As a result claimant's

[26] "The *decision* whether to institute such a policy, in our view, involves a basic policy judgment as to how the public interest may best be promoted." (emphasis added), supra, at page 538.

[27] This case was actually not decided on the issue of the discretionary function exception, see 350 U.S. at page 64, 76 S.Ct. 122.

vessel grounded. The Court refused to be led into "the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations." [28] It held instead that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." [29]

The Court went on to say:[30]

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. . . ."

Following this same reasoning, in *Sullivan* v. *United States,* 299 F.Supp. 621, 625-626 (N.D.Ala., 1968), aff'd 411 F.2d 794 (C.A. 5, 1969), liability was imposed upon the Government because of the failure of the F.A.A. to turn on airport runway lights, where the Airman's Information Manual and the chart furnished to airmen by the Govern-

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[28] Id., at page 65, 76 S.Ct. at page 124.

[29] Id., at pages 64-65, 76 S.Ct. at page 124. See also *Somerset Seafood Co.* v. *United States,* 193 F.2d 631 (C.A. 4, 1951) (negligent marking of wreck); *Everitt* v. *United States,* 204 F.Supp. 20 (S.D.Tenn., 1962); *Petition of United States,* 255 F.Supp. 737 (D.Mass., 1966); *Somlo* v. *United States,* 274 F.Supp. 827, 836 (N.D.Ill., 1967), aff'd 416 F.2d 640 (C.A. 7, 1969), cert. denied 397 U.S. 989, 90 S.Ct. 1122, 25 L.Ed.2d 397 (1970).

[30] Id., at page 69, 76 S.Ct. at page 126.



ment, indicated that the airport had lights and that they would be turned on when a pilot circled the field at night. See also *Fair* v. *United States,* 234 F.2d 288 (C.A. 5, 1956) and *Swanner* v. *United States,* 309 F.Supp. 1183 (M.D.Ala., 1970); but compare *Monarch Ins. Co.* v. *District of Columbia,* 353 F.Supp. 1249 (D.C.Dist.Col., 1973). Conversely, in *Doody* v. *United States,* 296 F.Supp. 210 (D.Me., 1969), an action against the Coast Guard for damages resulting from an explosion of a torpedo recovered in a fishing net was dismissed. There the Coast Guard issued erroneous instructions as to the handling of these explosives but claimants failed to show that these warnings were ever received or relied upon in recovering the torpedo.

We think, however, that the situation presented by *Hoffman* v. *United States,* supra, is more closely akin to the present case than are the "Good Samaritan" cases. In *Hoffman,* supra, the F.A.A. issued a certificate to the owner of an air taxi operation notwithstanding the fact that the owner did not hold economic authority from the Civil Aeronautics Board as required by F.A.A. regulations, a fact known by the F.A.A. at the time the certification was issued. The F.A.A. acted pursuant to a "notice" issued to its field personnel which instructed them not to deny certification for this reason, but rather to refer these violations to the CAB for enforcement. Thereafter the aircraft crashed and the passengers brought an action against the F.A.A. for negligence in the issuance of the certificate.

The F.A.A. alleged that the decision not to enforce was within the discretionary function, while Plaintiffs argued that once the F.A.A. regulation was promulgated, failure to follow it amounts to negligence in the exercise of a ministerial function.

In denying defendant's motion for summary judgment based on 28 U.S.C. § 2680(a), the Court said (supra, at page 539):

> ". . . Application of this regulation is done after the planning, or discretionary, state—at the operational level. *A claim of negligence in the application of this regulation does not involve a discretionary function . . . Negligence in the application of this regulation would render the government liable . . .*
>
> . . . The government has not cited any provision whereby the FAA was empowered to alter the standards contained in a regulation through the informal procedure here employed. While the court recognizes the government's argument that the formulation of this notice was a policy decision—a discretionary act —the court does not believe that this alters the conclusion that § 2680(a) does not apply.
>
> When the FAA promulgated the 'FAA Notice,' it was formulating a policy. In short, the policy was to disregard a former policy decision embodied in a duly promulgated regulation. Admittedly, the formulation of policy falls within the discretionary function exception. Thus, if one were to characterize the plaintiffs' complaint as one attacking a policy, the suit would be barred. However, one can just as easily characterize the complaint as one complaining of the refusal to apply a regulation. It is this latter characterization which the court believes to be the proper one.
>
> The result would be different if the regulation was not as specific and thus gave the FAA discretion in its application. But the court does not read the regulation in this manner. The result would also be different if





> the government could point to some authority which gave the FAA the power to change the policy by a method other than the formal amendment of the regulation. But without such citation of authority, the court believes that the regulation did not give the FAA the 'discretion' to informally amend the regulation." (emphasis supplied).

Within the framework of this legal setting we return to SO 8430.20C.

We have no difficulty in concluding that this order was a clear exercise of policy judgment as to how the public interest was best to be promoted. Cf. *Gercey* v. *United States,* supra. Furthermore we are not persuaded by the testimony presented in support of the proposition that the issuing authority intended this order to be applied at the discretion of the District Office. In a trial congested by documentary evidence, Defendant failed to buttress this allegation in any credible manner. At this late hour such a contention smacks of litigation-oriented reasoning, particularly when we consider that the language in Paragraph 2 of the "order *requires* action by . . . Flight Standards District Offices . . ." (emphasis supplied). In our opinion it is self-evident that this order is mandatory in nature.[31] Any possible residual discretion left to the District Office as to the operational implementation of this policy can hardly grant license to the mind-boggling logic whereby arriving aircraft are given preference over those

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[31] The use of the words "shall", "should" and "will" later in this document must be seen in the light of the all-encompassing mandate of Paragraph 2, and viewed in that light it indicates to us that they were used interchangeably in a mandatory sense. Webster's New International Dictionary (unabridged), pp. 2085-2086, 2104, 2616-2617.

about to depart, such action being in clear contravention to the basic policy established by higher authority.[32]

Therefore not being concerned with the exercise of a discretionary function but rather the performance of duties within the framework of a regulation, the "exercise of due care" standard contained in the first part of § 2680(a) is applicable.[33] *Hatahley* v. *United States,* 351 U.S. 173, 181, 76 S.Ct. 745, 100 L.Ed. 1065 (1956); *Sickman* v. *United States,* 184 F.2d 616, 620 (C.A. 7, 1950); *Hoffman* v. *United States,* supra. It follows that in violating its own orders, the F.A.A. demonstrated a failure to exercise due care. *Griffin* v. *United States,* 500 F.2d 1059 (C.A. 3, 1974); *United Air Lines* v. *Wiener,* 335 F.2d 379, 393-394, (C.A. 9, 1964), cert. dismissed 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed. 2d 549 (1964), and that, as previously expounded herein, by said misfeasance contributed to the death of Plaintiffs' decedents.

In view of the above we find for Plaintiffs on the issue of negligence.

IT IS SO ORDERED.

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[32] It has been suggested that among the relevant factors to be considered in the application of the discretionary function exception are: (1) whether the person whose judgment is attacked occupies a high or low level governmental position (*Hendry* v. *United States,* 418 F.2d 774, 782 (C.A. 2, 1969), (2) the nature and quality of the judgment exercised, (*Downs* v. *United States,* 522 F.2d 990, 997 (C.A. 6, 1975), and (3) whether the conduct involves discretionary acts at a "planning stage" in contrast to discretionary acts at an "operational stage." (*United States* v. *State of Washington,* 351 F.2d 913 (C.A. 9, 1965); but compare *Coastwise Packet Company* v. *United States,* 277 F.Supp. 920, 924 (D.Mass., 1968), aff'd 398 F.2d 77 (C.A. 1, 1968), cert. denied 393 U.S. 937, 89 S.Ct. 300, 21 L.Ed.2d 274 (1968). In our opinion none of these standards are of any aid to Defendant.

[33] "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . ."



## Appendix B

## Opinion and Order of U.S. District Court, District of Puerto Rico, dated February 4, 1977

CLEMENTE ET AL. v. UNITED STATES OF AMERICA

Cite as 426 F. Supp. 1 (1977)

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VERA ZABALA CLEMENTE *et al.*,
*Plaintiffs,*

v.

THE UNITED STATES OF AMERICA,
*Defendant.*

---

Civ. Nos. 778-73, 779-73, 999-73, 1000-73 and 1096-73.

United States District Court,
D. Puerto Rico,
San Juan Division.

Feb. 4, 1977.

SPEISER, KRAUSE & MADOLE, Washington, D. C., *for Plaintiffs.*

MICHAEL J. PANGIA, Dept. of Justice, Washington, D. C., Julio Morales Sanchez, U. S. Atty., District of Puerto Rico, San Juan, P. R., *for Defendant.*

OPINION AND ORDER

TORRUELLA, *District Judge.*

The Government has filed a "Motion for Reconsideration" to the Opinion and Order entered herein on November 24, 1976.

*Appendix B*

Before discussing the merits of said Motion, we are constrained to correct an erroneous impression created by Counsel for Defendant, in quoting out of context the Court's Order of August 11, 1976. Defendant chose to file post-trial briefs limited to the issue of the "discretionary function" defense, contrary to the directives of our Order of August 11, 1976, wherein the parties were required to file proposed findings of fact and conclusions of law together with their briefs. Because of this situation an over-burdened Court is now forced to consider matters which should properly have been brought to its attention at the time post-trial briefs were filed rather than by way of reconsideration.

The gist of Defendant's present Motion is the contention that F.A.A. Order SO 8430.20 C cannot be the basis for an action under Puerto Rican law, and thus under the Federal Tort Claims Act. Defendant further claims that the acts or omissions of the Government were not the proximate cause of the crash. We disagree on both points.

The Federal Tort Claims Act, 28 U.S.C. §1346(b), permits civil tort actions for money damages against the United States caused by the negligent or wrongful act or omission of Government employees under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The fountainhead of tort law in Puerto Rico is Article 1802 of the Civil Code (31 LPRA 5141), which states in its relevant part:

> "A person who by an *act or omission* causes damage to another through *fault or negligence* shall be obliged to repair the damage so done. . . ." (Emphasis supplied).



*Appendix B*

Without unnecessarily digressing into pedantic legal philosophy, suffice it to say that this article establishes what is probably the broadest basis for tort liability in any jurisdiction of the United States.

In the leading case of *Reyes* v. *Heirs of Sánchez Soto,* 98 P.R.R. 299 (1970), the Supreme Court of Puerto Rico stated, at pages 303-304 thereof:

> "The concept of fault of Sec. 1802 of the Civil Code—1930 ed.—is infinitely embracing, *as ample and embracing as human conduct is.* J. Casares, in his 'Diccionario Ideológico', 2d ed. 1963, defines guilt as 'fault more or less serious, committed knowingly and willfully.' And 'fault' as '*defect in acting.*' Cabanellas states that 'guilt' in its ample sense means any fault, willful or not, of a person which produces a wrong or damage, in which case 'guilt' is equivalent to 'cause.'" (Emphasis supplied).

The Court goes on to state (in footnote 1) that "the Saxon concept of civil fault is equally embracing" and then cites Black's Law Dictionary's definition of "fault":

> "[A]n error or defect of *judgment* or of conduct; any deviation from prudence, *duty,* or rectitude; any shortcoming, or neglect of care or performance resulting from *inattention,* incapacity, or perversity; a wrong tendency, course, or act; bad faith or *mismanagement; neglect of duty.*" (Emphasis supplied).

See also Puig Brutau, "Fundamentos de Derecho Civil" (1956), Tomo II, Volumen II, pp. 676-683; Manresa, "Código Civil Español", 1951 Ed., Vol. XII, pp. 637-659.

In this case we are concerned precisely with neglect of duty, a duty created in a general manner by Congress when

it enacted the Federal Aviation Act of 1958 (49 U.S.C. § 1301, et seq.) and thereafter, in a more precise fashion, as a result of the experiences of the F.A.A., by that Agency's promulgation of Order SO 8430.20 C. Had the requirements of this Order been included in the Statute itself, we doubt that the Government would be in a position, leaving aside for the moment the question of causation, to assume its present stance (see page 21 of the Government's Memorandum).

In its Motion, however, the Government takes the position that there is no liability because the Order is "an internal agency enforcement directive." Defendant is circumspect in not questioning the validity or authority of the Order (see 49 U.S.C. § 1421(a), (b); 14 CFR 11.21(c)), but rather contends that the violation of "orders not duly promulgated as regulations [does not] constitute [. . .] negligence *per se*."

Even assuming such were the basis for our decision, there is at least one leading case to support this position. *Eastern Air Lines* v. *Union Trust Co.*, 113 F.Supp. 80 (1953), 95 U.S.App.D.C. 189, 221 F.2d 62 (1955) reversed on other grounds, 350 U.S. 907, 76 S.Ct. 192, 100 L.Ed. 796 (1955), order of reversal modified and case remanded, 350 U.S. 962, 76 S.Ct. 429, 100 L.Ed. 835 (1956). In that case, an air traffic pattern was published in the Airman's Guide but not in the Federal Register. The trial court charged the jury that the traffic pattern was a binding regulation, deviation from which was negligence *per se*. The airline in question admittedly had knowledge of the pattern, as did the F.A.A. personnel in San Juan have knowledge of SO 8430.20 C. The Court in *Union Trust* found the pattern to be "prescribed by rule which has the force and effect of law." 221 F.2d at p. 69. We fail to see why SO 8430.20 C



should not also have the force of law, particularly when it is the basis of a claim by the parties the Order was intended to protect. Cf. *Vitarelli* v. *Seaton*, 359 U.S. 535, 539, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); *Columbia Broadcasting Sys. Inc.* v. *U. S.*, 316 U.S. 407, 422, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942); *United States* v. *Heffner*, 420 F.2d 809, 812 (CA 4, 1970); *Smith* v. *Resor*, 406 F.2d 141 (CA 2, 1969). See generally, Note, "Violations by Agencies of Their Own Regulations", 87 Harv.L.Rev. 629 (1974). Also Davis, "Administrative Law Treatise", Vol. 1, Sec. 610.

There are several other cases in which internal agency directives have been held to establish an actionable duty by those intended to be benefited by the directive. In *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (CA 2, 1967) a duty to report weather conditions to aircraft was found to be created by the "Air Traffic Control Procedures Manual" of the F.A.A. A similar conclusion was reached by the Fifth Circuit in *Hartz* v. *United States*, 387 F.2d 870 (CA 5, 1968). See also *Stork* v. *United States*, 278 F.Supp. 869 (D.C.E.D.Wisc., 1968) (regulations, instructions, custom and practice). Cf. *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (CA 9, 1964).

Irrespective of whether violation of Order SO 8430.20 C is found to be negligence *per se*, or merely evidence of negligence, the record as a whole supports an ultimate finding of negligence or fault by the F.A.A. We will not restate herein the contents of our prior decision. The following summary of the more salient facts should be sufficient when considered in the light of the duties created by the Statute and SO 8430.20 C: Rivera had a recent (i. e. 1971) record of violations of F.A.A. regulations for transportation of persons or property without proper certification; at the time of the present accident, Rivera was under in-

vestigation for another incident, in which the F.A.A. investigator had already concluded that Rivera was guilty of careless and reckless operation of an aircraft; the San Juan Office of the F.A.A. was aware that Rivera was advertising for lease the aircraft here in question; the F.A.A. in San Juan was aware of the specific flight subject of this suit at least from the time the flight plan was filed (see Item 6, Plaintiff's Exhibit 1) simultaneously with a Custom Declaration form, about 5 hours before take off; at take off the aircraft was overloaded by 4,193 pounds in excess of its maximum allowable gross take off weight and lacked its full complement of crew;[1] N 500 AE crashed because No. 2 engine was "overboosted" and failed by reason of overloading of the aircraft and of inadequate crew.[2]

The existence of SO 8430.20 C in substantially the same form since April 5, 1971, not only establishes a standard of duty but clearly brings forth the foreseeability of the present situation particularly when the facts previously stated are taken into consideration.

We will not reiterate the analysis contained in our previous Opinion regarding the mandatory nature of SO 8430.20 C. Nothing in Defendant's Motion has caused us to alter our Opinion to the effect that it was mandatory, and required a ramp inspection of N 500 AE before it departed, an inspection which admittedly did not take place because of a decision by local F.A.A. personnel to inspect

[1] This flight was required to have, a flight engineer. To the extent that our prior opinion held that Rivera was not authorized to fly as copilot, said finding is modified pursuant to 14 CFR 61.16 and 61.3(a).

[2] See the testimonies of Delgado Cintrón and F.A.A. inspectors Villafañe and Davis.



only arriving aircraft.[3] We have no doubt that had such an inspection taken place it would have been readily apparent to the F.A.A. inspector that the aircraft was overloaded and inadequately crewed.[4] As stated in our decision of November 24, 1976, Defendant was required to warn Plaintiff's decedents of this unsafe situation.

In our opinion, the failure of the F.A.A. to meet the duties established by an Order which had the force of law, was a cause of the accident here in question. Even if not the *only* cause, the Defendant is responsible in this jurisdiction for his fault because the damages which resulted from the breach of duty were a natural, probable and foreseeable consequence of Defendant's omission. *Gines* v. *Aqueduct and Sewer Authority,* 86 P.R.R. 490, 496-497 (1962); *Reyes* v. *Heirs of Sánchez Soto,* supra. The intervening negligence or fault of third parties, if such were the case herein, does not relieve a defendant from liability in this jurisdiction where, as in the present case, the intervening party was aided by the Defendant's fault, or where

[3] The allegation that the duty inspector of that day was engaged in accident investigation, which according to SO 8430.20 C had higher priority, seems to be an afterthought. In the first place, since pursuant to instructions only arriving craft would be inspected, the fact that the duty officer was otherwise engaged would seem to be an irrelevant factor. Furthermore, the deposition of Mattern indicates that, at least at the times relevant herein, he was in his home. Lastly since Paragraphs 3 and 9 of the Order required the use of irregular or modified workweeks, it was incumbent on Defendant to prove that no one other than Mattern was available.

[4] Defendant's present protestation about the difficulties of determining the weight of a loaded aircraft seem equally hollow and might induce us to conclude that the Order was not complied with because of the required effort rather than the other excuses given. It would seem that if an Order was issued by an agency with the expertise of the F.A.A., that impossible tasks would not be required of its personnel.

*Appendix B*

the actions of said party were foreseeable within the chain of circumstances set in motion or contributed to by Defendant. *Gines,* supra; *Pabón Escabí* v. *Axtmayer,* 90 P.R.R. 20 (1964).

Contrary to what Defendant herein seems to contend, Plaintiffs do not have to exclude all possible causes of the accident before we can reach a conclusion as to Defendant's fault. Rather, the standard is that Plaintiff establish facts upon which a reasonable person can be convinced, by the preponderance of the evidence, that the wrongful act was caused or contributed to by Defendant's fault. *Prieto* v. *Maryland Casualty Company,* 98 P.R.R. 583, 615 (1970). This we believe the Plaintiffs have done.

The Motion for Reconsideration is hereby denied.

The Court being of the opinion that the decision in this case falls within the purview of an interlocutory appeal as contemplated by 28 U.S.C. § 1292(b), and that such an immediate appeal would materially advance the ultimate termination of this litigation, Defendant is hereby ordered to file an application for interlocutory appeal to the Court of Appeals, within 10 days from the date of this Order.

It Is So Ordered.



**Appendix C**

**Opinion of U.S. Court of Appeals, First Circuit, dated December 16, 1977**

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 77-1156

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Vera Zabala Clemente, et al.,

*Plaintiffs, Appellees,*

v.

United States of America,

*Defendant, Appellant.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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[Hon. Juan R. Torruella, *U.S. District Judge*]
(422 F. Supp. 564 (D.P.R. 1976);
426 F. Supp. 1 (D.P.R. 1977))

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Before:

Coffin, *Chief Judge,*
Campbell, *Circuit Judge,* Crary, *District Judge.**

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Michael J. Pangia, Trial Attorney, Aviation Unit, United States Department of Justice,

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* Of the Central District of California, sitting by designation.

with whom JULIO MORALES-SANCHEZ, United States Attorney, and JONATHAN M. HOFFMAN, Attorney, were on brief, *for Appellant.*

STUART M. SPEISER, with whom SPEISER, KRAUSE & MADOLE was on brief, *for Appellees.*

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December 16, 1977

COFFIN, *Chief Judge.*

On December 31, 1972 Roberto Clemente, two other passengers and two crewmen were killed in the crash of a private plane off the coast of Puerto Rico. Clemente, an outstanding professional baseball player, had chartered the aircraft to carry relief supplies to the victims of an earthquake in Nicaragua. Plaintiffs, the relatives and representatives of the deceased passengers, sued the United States under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2671 *et seq.*), alleging that employees of the Federal Aviation Administration (FAA) acted negligently in failing to warn Clemente and the other passengers that the aircraft they were about to embark on was overweight and lacked a proper flight crew. Further details of the accident and the events preceding it are described at length in the district court's opinion, 422 F. Supp. 564 (D. P.R. 1976).

A prerequisite for recovery under the Federal Tort Claims Act is that there be a "negligent or wrongful act or omission of an employee of the government while acting within the scope of his office or employment, under circumstances where the United States, *if a private person,* would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*" 28 U.S.C.





§ 1346(b) [emphasis added]. Here the law of Puerto Rico is controlling.

In denying the government's motion for reconsideration of the court's original opinion and order, the district court pointed out, 426 F. Supp. 1 (D. P.R. 1977), that Article 1802 of the Puerto Rico Civil Code (31 LPRA 5141)[1] creates an extremely broad "basis for tort liability". While the civil law concept of fault may indeed appear to be sweeping, we do not understand the district court to suggest that it is tortious conduct in Puerto Rico to fail to inspect another person's property or vehicle and consequently to warn him of impending injury unless the alleged tortfeasor has some duty to the victim requiring the performance of these protective measures. Indeed, the court acknowledges that "In this case we are concerned precisely with neglect of duty . . .", 426 F. Supp. at 2. Moreover, none of the cases cited to us by the district court or appellees have found liability in such a situation.[2]

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[1] Article 1802 states that "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done . . . ."

[2] The facts of all the cases cited by the district court or appellees involve relationships that would create liability under traditional tort doctrines. *See Reyes* v. *Heirs of Sanchez Soto,* 98 P.R.R. 299 (1970) (duty not to misrepresent information on which others relied); *Prieto* v. *Maryland Casualty Co.,* 98 P.R.R. 583 (1970) (duty of lessor to deliver equipment to lessee in safe operating condition); *Rivera* v. *Maryland Casua[illegible]6* P.R.R. 788 (1968) (duty of home owner to guest); *Pa[illegible]bi* v. *Axtmayer,* 90 P.R.R. 20 (1964) (duty of hotel keeper to protect person and property of guests); *Gines* v. *Aqueduct and Sewer Authority,* 86 P.R.R. 490 (1962) (duty not to install meter on public walkway so that it created a hazard); *Ramos* v. *Carlo,* 85 P.R.R. 337 (1962) (duty of store owner not to throw refuse in street where pedestrians can trip on it); *Correa* v. *P.R. Water Resources Authority,* 83 P.R.R. 139 (1961) (unmarried woman living with man for many years allowed to sue for breach of duty to prevent his wrongful death); *Hernandez* v. *Fournier,* 80 P.R.R. 94 (1957) (parents may sue person who intentionally killed their daughter).

The critical question then is whether the FAA staff in Puerto Rico was under a duty to inspect the aircraft and to warn plaintiffs' decedents of any irregularities. The district court found that such a duty was created "in a general manner" when Congress passed the Federal Aviation Act and "in a more precise fashion" through the issuance of Order SO 8430.20C[3] by the Director of the Southern Region. The court concluded that since the Southern Region's order was mandatory and had the "force of law", it established an actionable duty to those whom the order sought to protect.

This analysis oversimplifies a complicated legal situation. It is obvious that one of the purposes of the Federal Aviation Act was to promote air travel safety; but this fact hardly creates a legal duty to provide a particular class of passengers particular protective measures. While the Federal Aviation Act empowered the administrative staff of the FAA to issue an order such as SO 8430.20C, the Act itself does not require this conduct.[4] The agency,

[3] The relevant parts of the order are printed in their entirety on pp. 570-71 of the district court opinion. The exact wording of section 7d that "Clear indication of alleged illegal flight should be made known to flight crew and persons chartering the service" is critical to the district court's analysis. The district court concluded that the FAA had obligated itself to warn the passengers of the flight of any safety problems, and this section of the order is the only language from which such an obligation could be inferred. We shall assume arguendo that the Order did require a warning to the passengers of the flight in question.

[4] 49 U.S.C. § 1354 reads:

> "Other powers and duties of Administrator.—(a) General.—The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act."



in issuing the order, was acting entirely gratuitously and was under no obligation or duty to plaintiffs' decedents or any other passengers.

Given this general scope of statutory authority and the lack of any specific legislative mandate concerning the measures allegedly required by the Southern Region's order, the issue is whether the promulgation of that order created a duty of care on the part of the government to plaintiffs' decedents in light of the Federal Tort Claims Act's requirement that the United States be held liable only if private parties would be liable for comparable conduct. We sympathize with the district court's struggles in attempting to apply the Tort Claims Act's conceptually difficult provision. Because the powers of the United States are so vast and because the government necessarily includes a wide variety of institutional forms and legal relationships, the United States cannot easily be envisioned as a single entity in the "man in the street" world of common law torts.

Much of the problem results from the fact that the government frequently acts in a sovereign capacity. In one sense whatever the government says is law. However, for the purposes of the Federal Tort Claims Act the sovereignty of the government must, in many cases, be ignored. Clearly "no private individual has power to assume the prerogatives of sovereignty", *Union Trust Co. of District of Columbia* v. *United States*, 113 F. Supp. 80, 82 (D. D.C. 1953). It was therefore perhaps understandable that the government would argue that when it acted in its sovereign capacity it was excluded from liability under the Act since there could be no comparable private conduct. The courts, recognizing that such a doctrine would unduly restrict the scope of the Act beyond the intent of Congress,

have consistently rejected this "sovereignty" defense at all judicial levels. *See, e.g., Union Trust Co., supra; Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955). But this decision to ignore the government's sovereignty operates in the reverse direction as well. Just as the government cannot invoke sovereignty as a defense to distinguish its conduct from that of private persons, plaintiffs cannot use the implicit sovereignty of the government to argue that all its internal communications establish standards of care similar to those created by duly promulgated laws of general application. Not all acts and orders of the United States government are so sovereign that they must be treated as commands which create legal duties or standards, the violation of which involves breaking the law. A considerable part of the government's conduct is in the context of an employer-employee relationship, a relationship which includes reciprocal duties between the government and its staff, but not necessarily a legal duty to the citizenry.

In the present case a member of the FAA staff, in an attempt to implement agency policy, ordered the Flight Standards District Office to take certain steps regarding the surveillance of large turbined powered aircraft. Even assuming, as plaintiffs contend, that this order was mandatory, the duty it creates is that of the District Office employees to perform their jobs in a certain way as directed by their superiors. This duty to comply with the directives of their superiors is owed by the employees to the government and is totally distinguishable from a duty owned by the government to the public on which liability could be based. The failure to perform the order may be grounds for internal discipline, but it does not follow that such



conduct necessarily constitutes the kind of breach cognizable by tort law.[5]

The appropriate analogy to private life seems to be that of a corporate employer who has hired a safety director to insure that the firm's business environment is free from accidents and health hazards. Acting entirely within his authority the safety director orders his staff to check that other firms in the vicinity are meeting fire regulation standards. If one such employee fails to inspect a nearby firm's building and if it burns to the ground thereafter because of unsafe conditions which would have been rectified had the employee carried out his assigned task, is either the employee or the employer liable for this failing? We think not. No Puerto Rico case alleging a remotely similar basis for liability has been brought to our attention.[6] Moreover, the Restatement of Torts 2d §§ 323 and 324A[7] makes it

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[5] *Gercey* v. *United States,* 540 F.2d 536 (1st Cir. 1976), although similar in some respects to the present case, is not relevant to the problem before us. That case simply concluded that the Coast Guard cannot be liable under the Tort Claims Act for "failing to adopt a policy of taking positive steps to protect the public . . . ." *Id.* at 538. Our proviso that had the issue in *Gercey* been based on allegations that the Coast Guard had "imperfectly execut[ed] a federal program established either by an act of Congress or federal regulation", *id.,* the case would have required a different analysis, provides no support for plaintiffs' position. The Southern Region's directive was neither a statute nor a regulation. Moreover, our citation to *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955) indicates that our proviso was limited to the imperfect execution of policy on which the public relied.

[6] *See* note 2, *supra.*

[7] The pertinent provisions of the Restatement of Torts 2d read as follows:

"§ 323. Negligent Performance of Undertaking to Render Services

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary

clear that liability in such a situation must be predicated on one of three grounds: the conduct of the employee actually increased the risk of harm to the damaged firm; the harm to the damaged firm resulted from its reliance on the employee carrying out the inspection as ordered; or there existed a prior duty to inspect owed by the employer to the damaged firm. *See generally Davis* v. *Liberty Mut. Ins. Co.*, 525 F.2d 1204 (5th Cir. 1976). None of these conditions apply to our analogy or to plaintiffs' claims in the matter before us. There was no underlying statutory duty to offer special protection to plaintiffs' decedents; the failure to inspect in no way added to the risk of injury to the passengers or crew; and there is no evidence that anyone relied on the contents of SO 8430.20 C and limited

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for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking."

"§ 324A. Liability to Third Person for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third persons or his things, is subject to liability to third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

*See generally Jeffries* v. *United States*, 477 F.2d 52 (9th Cir. 1973).



their own safety precautions accordingly. Therefore there can be no basis for liability under general principles of tort law and the Federal Tort Claims Act.

To hold otherwise would be to interpret every command made as an exercise of discretion by the supervisory or administrative staff of any federal agency as creating a duty of the federal government to the beneficiaries of that command such that the government would be liable to the beneficiary if the command was not carried out.[8] We do not believe the Federal Tort Claims Act was intended to expose the government to such limitless liability and would not so hold unless we were required to do so by established precedent. Indeed, because the policy implications of finding liability on the grounds suggested here would be so severe, and because the surrender of sovereign immunity by the government should be interpreted narrowly, we must subject to critical scrutiny the cases cited by the district court to support its conclusion that the Federal Aviation Act and the Southern Region's order created an actionable duty on the part of the federal government.

Under such examination we do not find the district court's authorities to be persuasive. Four of the cases cited do not involve tort liability of any kind. *Columbia Broadcast-*

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[8] Indeed, it is difficult to tell from the record who is responsible for the specific content of SO 8430.20C and in particular section 7d. The Chief of the Flight Standards Division of the Southern Region of the FAA testified that the basis of the order was "a Washington directive, telegraphic that generally recommended the establishment of a large aircraft surveillance program", *see* Joint Appendix p. 1084. He also testified that his staff had written the order, but that he had reviewed it. What is clear is that there is no indication that the level of authority at which the order was issued is relevant to the decision of the court below. As long as the order was issued by some administrator with the authority to command the San Juan Flight Standards District Office staff, the reasoning of the district court's opinion would be controlling.

*ing Systems, Inc.* v. *United States,* 316 U.S. 407, 422 (1942), held that regulations characterized by an agency as announcements of policy "must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power . . . ", and as such are reviewable by the Court. This is inapposite to the facts of the present case; there is no claim that any of plaintiffs' decedents relied on the Southern Region's order in any way or even knew of its existence for that matter, and the relevant issue here is liability, not reviewability.

The other three non-tort cases relate to due process standards which require agencies to abide by their own regulations or directives. *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959) involves the rights of a federal employee to have the government abide by its own procedural rules in imposing sanctions on him. *Smith* v. *Resor,* 406 F.2d 141 (2d Cir. 1969) is similar except that it deals with the rights of an army reservist against the military as opposed to the rights of an employee. *United States* v. *Heffner,* 420 F.2d 809 (4th Cir. 1970) concerns the rights of a taxpayer to have IRS agents obey their own orders and instructions while interrogating him in connection with a tax fraud investigation.[9] None of these cases have anything to do with the establishment of specific standards of care for purposes of tort liability. They only relate to the same due process duty, required of all agencies, to treat citizens uniformly and in a non-arbitrary manner.

[9] In *United States* v. *Leahy,* 434 F.2d 7 (1st Cir. 1970), we decided a case similar to *United States* v. *Heffner* and pointed out that agencies must be required to follow their own regulations because uniformity and reliance interests depend on such a rule. These due process interests have no bearing on the negligent failure to inspect alleged in the present case.



The remaining cases cited by the district court all involve accidents resulting from the negligence of air traffic controllers. Appellees point out several additional cases in which liability was upheld in similar circumstances. There can be no doubt that federal air traffic controllers are held to a wide range of duties to the air travelling public, and that the Air Traffic Control Procedures Manual of the FAA is used by courts to determine at least part of the scope of those duties. *See, e.g., Dickens* v. *United States,* 545 F.2d 886 (5th Cir. 1977); *Hartz* v. *United States,* 387 F.2d 870 (5th Cir. 1968); *Ingham* v. *Eastern Air Lines, Inc.,* 373 F.2d 227 (2d Cir. 1967).

However, while we can understand how one could generalize from the air controller's duties to the responsibilities of FAA inspectors, both history and policy establish that the differences between the two are extensive and require different legal consequences.[10] The role of control tower operators existed prior to any attempt by the federal government to regulate them. It is in the nature of that role that any person endeavoring to undertake it owes a duty to those dependent on the quality of his performance. "The *relationship* between the air controller and the pilot

[10] We are aware that there is language in *Delta Air Lines* v. *United States,* 561 F.2d 381 (1st Cir. 1977) suggesting that the violation of federal safety procedures creates a cause of action, in particular our statement that "Our finding of controller negligence in failing to follow established mandatory procedures is grounded on the premise that the unexcused violation by a federal employee of procedures established by the Government which have as their purpose the protection of those who were in fact harmed constitutes negligence." *Id.* at 393-394. However, this statement must be understood in terms of the context in which the opinion was written, that is, the procedures governing the conduct of air tower controllers. For the reasons discussed in the text, *infra,* the duties of air controllers and the procedures that govern them are not analogous to other facets of the FAA operations or the work of other federal agencies.

of a plane which is landing or taking off *creates a duty of care* on the part of the controlled." *Yates* v. *United States,* 497 F.2d 878, 882-83 (10th Cir. 1974) [emphasis added]. Indeed, the first federal manual setting standards for control tower procedures was issued while a significant number of air control towers were not manned by federal employees. Over time Congress authorized federal agencies to maintain and operate air control towers under complete federal control. At the present time federal regulations require that "An air traffic control operator shall perform his duties in accordance with . . . the procedures and practices prescribed in air traffic control manuals of the FAA to provide for the safe, orderly, and expeditious flow of air traffic." 14 CFR 65.45(a). *See generally, Eastern Air Lines* v. *Union Trust Co.,* 221 F.2d 62 (D.C. Cir. 1955), *aff'd sub nom., United States* v. *Union Trust Co.,* 350 U.S. 907 (1955), for a complete discussion of the unique history of air tower controllers in the United States and their non-federal origin.

Thus the duties of air tower controllers have three unique characteristics totally distinguishable from the FAA inspectors before us. First, they operate under federal rules which were clearly designed to establish standards of care for a particular role, regardless of the status of the employee (private, public, municipal or federal) fulfilling it. A federal employee is subject to whatever duty is imposed by these regulations in the same manner in which any citizen would be. The inspectors at San Juan, on the contrary, were given orders as federal employees to perform certain tasks and were bound to obey them only as employees. As such they owed a duty to those who would receive the benefit of their performance only to the extent that their superiors owed such a duty. As has been



noted, the issuance of SO 8430.20C was not required by law or legal duty, it was a discretionary policy decision.

Second, the nature of the role of air tower operators involves various duties to air traffic regardless of the procedures promulgated in the manual. This is confirmed by the decisions which have found the duties of air tower controllers to extend beyond that required by the FAA manual, *see American Airlines, Inc.* v. *United States,* 418 F.2d 180, 193 (5th Cir. 1969); *United States* v. *Furumizo,* 381 F.2d 965, 968 (9th Cir. 1967); *Hartz* v. *United States,* 387 F.2d 870 (5th Cir. 1968); *Stork* v. *United States,* 430 F.2d 1104 (9th Cir. 1970); *Spaulding* v. *United States,* 455 F.2d 222, 226 n. 8 (9th Cir. 1975). Tort liability is intrinsic in the function; once the government took control of the air towers it became subject to the duties that would devolve on any entity that took on such responsibility. There is no comparable duty related to the role of FAA inspector. The relationship between air passengers and inspectors could develop into one in which common law tort duties applied, but as yet there is no basis for assuming that particular duties, not defined by statute, apply to this role.

The third characteristic is a corollary of the second. The relationship between pilots and passengers and air controllers is imbued with reliance, a foundation stone of tort liability. One can no more imagine an air traffic controller being free from the weight of reliance interests than one can a traffic policeman at a busy intersection. Traffic safety is dependent on every action and inaction. This has been recognized directly, *see Yates* v. *United States,* 497 F.2d 878, 883-884 (10th Cir. 1974); *Gill* v. *United States,* 429 F.2d 1072 (5th Cir. 1970); *Ingham* v. *Eastern Airlines, Inc.,* 373 F.2d 227, 236 (2d Cir. 1967); *Allen* v.

*United States,* 370 F. Supp. 992, 999 (E.D. Miss. 1973). It is also apparent from the number of air controller liability cases citing the "Good Samaritan" doctrine beginning with *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1965), which held that when the government gratuitously undertakes to perform a service upon *which members of the public justifiably rely,* it will be held to an appropriate standard of care in carrying the service out. *See Spaulding* v. *United States,* 455 F.2d 222, 226 n. 9 (9th Cir. 1975); *Yates* v. *United States,* 497 F.2d 878, 884 (10th Cir. 1974); *Gill* v. *United States,* 429 F.2d 1072, 1074 (5th Cir. 1970); *Dickens* v. *United States,* 378 F. Supp. 845 (S.D. Tex. 1974); *Allen* v. *United States,* 370 F. Supp. 992, 999 (E.D. Miss. 1973).[11]

There is no indication in the present case that plaintiffs' decedents or anyone else for that matter have ever relied on the FAA to inspect a charter aircraft before they embark on a private flight. We doubt that the Supreme Court in *Indian Towing* would have found liability if the government's negligence simply amounted to failing to construct a lighthouse as ordered by a Coast Guard official when the seafaring public was unaware that such an order had been given, and the lighthouse was never operational.

[11] Instead of citing *Indian Towing,* several cases cite the language of *Ingham* v. *Eastern Airlines, supra* at 236, that "when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently." *See American Airlines, Inc.* v. *United States,* 418 F.2d 180, 192 (5th Cir. 1969); *Hartz* v. *United States,* 387 F.2d 870 (5th Cir. 1968). It is clear from examining that passage from *Ingham* in context that it refers to good samaritan conduct upon which the public can rely.



Although there are few cases that discuss the creation of a duty directly outside of the air controller context, we believe a related line of cases is relevant. On several occasions an employee of an independent contractor working on a government project has been injured or killed in an accident and suit is brought against the United States under the Federal Tort Claims Act. An early case to discuss this issue was *Kirk* v. *United States,* 270 F.2d 110 (9th Cir. 1959). In *Kirk* plaintiff's decedent was killed while working on a dam project on United States property; the project required implementing plans developed by the U.S. Army Corps of Engineers. Decedent's employer, an independent construction company, was under contract with the United States government. One of the provisions of the contract required the construction company to comply with the safety standards of the Corps of Engineers' "Safety Requirements" manual, and permitted the government to halt work on the project for any lack of prompt compliance. Several other safety manuals and army regulations calling for mandatory and continuous safety programs on construction projects were introduced into evidence. Government inspectors were regularly on the site. Yet the court did not find the government to be liable because the statute under which the construction was undertaken did not "establish a duty of care on behalf of the United States toward employees of an independent contractor" nor did it "authorize the creation of such duty by the Secretary of the Army or the Chief of Engineers through the issuance of regulations, manuals or directives." *Id.* at 117. Similarly, although we acknowledge that a principal purpose of the Federal Aviation Act was to promote the safety of air traffic, we are unable to take the additional step of holding that Congress

intended to authorize Regional Directors to create a legal duty of care between the federal government and a particular class of passengers.[12] It may be that in carrying out internal directives over a period of time, the FAA staff's conduct will engender sufficient justifiable reliance to create an actionable duty of care, but this is fundamentally different than deriving such a duty from the mere issuance of a directive.

The general holding of *Kirk* that employees of independent contractors cannot recover from the government under the Federal Tort Claims Act on the basis of contractual obligations requiring various safety measures and the presence of government safety inspectors in the area, has been affirmed on numerous occasions. *See Fisher* v. *United States,* 441 F.2d 1288 (3d Cir. 1971); *Market Insurance Co.* v. *United States,* 415 F.2d 459 (5th Cir. 1969); *Lipka* v. *United States,* 369 F.2d 288 (2d Cir. 1966); *United States* v. *Page,* 350 F.2d 28 (10th Cir. 1965); *Blaber* v. *United States,* 332 F.2d 629 (2d Cir. 1964); *McGarry* v. *United States,* 370 F. Supp. 525 (D. Nev. 1973), *rev'd on other grounds,* 549 F.2d 587 (9th Cir. 1976). We recognize that a significant reason for the failure to find liability in these cases, and one which at first glance distin-

[12] Although the relevant statute in *Kirk,* 33 U.S.C. § 701(b) made no specific reference to safety, other cases in accord with the holding of *Kirk* concern Atomic Energy Commission contracts and research under 42 U.S.C. § 2051, *see Blaber* v. *United States,* 332 F.2d 629 (2d Cir. 1964); *McGarry* v. *United States,* 370 F. Supp. 525 (D. Nev. 1973), *rev'd on other grounds,* 549 F.2d 587 (9th Cir. 1976). This statute specifically provides that "The arrangements made pursuant to this section shall contain such provisions (1) to protect health, (2) to minimize danger to life or property, and (3) to require the reporting and to permit the inspection of work performed thereunder, as the Commission may determine." 42 U.S.C. § 2051(d).



guishes them from the current case, is the belief that the primary responsibility for the safety of a contractor's employees rests with the contractor himself, not the federal government. However, federal regulations similarly make clear that "The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight." 14 CFR 91.29(b). *See also* 14 CFR 91.163.[13] Given this primary locus of responsibility, we do not feel that administrative directives, without more, shift the onus of potential tort liability to the federal government.

The cases we have just considered turned on the lack of direct statutory authority for the existence of a federal duty of care to a particular class of individuals. It should be noted that even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability. Thus in *Davis* v. *United States,* 395 F. Supp. 793 (D. Neb. 1975), *aff'd,* 536 F.2d 758 (8th Cir. 1976) the court dismissed a complaint alleging that an Occupational Safety and Health Administration compliance officer had negligently failed to follow up a safety violation citation which resulted in injury to the plaintiff. The court could "find no indication that any law permits Nebraska to place upon private persons the duties cast upon federal officers by OSHA. The Act's thrust is to require

[13] *Hartz* v. *United States,* 387 F.2d 870 (5th Cir. 1968) and *United States* v. *Schultetus,* 277 F.2d 322 (5th Cir. 1960) confirm that a pilot has primary responsibility for his aircraft as long as he has the necessary information to insure its safety available to him. There is no suggestion in the present case that the pilot did not know or should not be held responsible for such facts as the qualifications of his crew and the weight of his cargo.

designated federal officers to investigate, issue citations, and apply for enforcement orders by a federal court. Nothing resembling those duties devolves on a private person under OSHA . . . To the extent that the complaint in the case at bar is rooted in federal law as a source of duties of the United States or its compliance officer, it must fall." *Id.* at 795-96.

Similarly, in *United States* v. *Smith,* 324 F.2d 622, 624-625 (5th Cir. 1963), plaintiffs argued that government contracting officers, committed acts of negligence by failing to enforce the provisions of the Miller Act requiring that all those who undertake construction contracts with the United States furnish payment bonds. The court ruled that the Federal Tort Claims Act "simply cannot apply where the claimed negligence arises out of the failure of the United States to carry out a statutory duty in the conduct of its own affairs." [14]

There can be no doubt that the mandate of a federal statute is a far stronger foundation for the creation of an actionable duty under the Federal Tort Claims Act than the administrative directive in the present case. The inclusion of orders in a statute not only indicates that Congress

[14] *Somerset Seafood Co.* v. *United States,* 193 F.2d 631 (2d Cir. 1951) suggests that the United States is bound by federal statutory duties for the purposes of the Federal Tort Claims Act. However, in that case the government negligently performed services (the marking of a shipwreck) on which seagoing ships relied to their detriment. This would have been a sufficient ground for liability without the statutory duty. Moreover, the government was taking over a duty previously required of the ship owner. As such it would be anomalous if the very act of replacing a duty on a private party with a duty on the government negated the rights of those whom the duty was designed to benefit. In contrast the safety responsibilities of the pilot and crew here were certainly not diminished by the issuance of SO 8430.20C.



has made a definitive judgment that a particular class receive specific benefits or services, it also is far more likely to generate reliance than any internal regulation or directive. Thus the fact that courts have been reluctant to find liability despite the violation of specific federal statutory responsibilities strongly confirms our conclusion that the Southern Region's order in this case issued under the general authority of the Federal Aviation Act does not give rise to a legal obligation sufficient to support a cause of action under the Federal Tort Claims Act.[15]

We should point out that there is a fine line but a vital and necessary one between the principle of holding the government responsible for the conduct by which it carries out its affairs when federal employees negligently injure the public and the principle that the government may be turned to as a final source of relief from the tragedies of life. As the court in *Gibbs* v. *United States,* 251 F. Supp. 391, 400 (E.D. Tenn. 1965) noted, "Having decided to enter the broad field of the regulation of the flight and repair and modification of aircraft and licensing of pilots, the Government becomes responsible for the care with which those activities are conducted. It may no longer take refuge behind the distinction between proprietary and governmental functions. But the Government nevertheless does not become an insurer. Its liability is subject to the same requirements of negligence and causation as would affect the liability of a private person in the same circumstances."

[15] Because we find that plaintiffs have not established a cause of action under the Federal Tort Claims Act we need not address the further issue argued by the government that the conduct of the FAA and its inspectors is covered by the discretionary function exemption of the Tort Claims Act, 28 U.S.C. § 2680(a).

*Appendix C*

Certainly whether the Congress should take a more active role in providing compensation for the victims of air disasters is not an appropriate question for this court to decide. Moreover, to attempt to expand the relief available to victims and their families through the Federal Tort Claims Act in circumstances similar to those of this case would, we believe, have an unfortunate inhibiting effect on government safety measures. The end result of attaching liability to government attempts at all levels to supplement the safety precautions of private individuals and businesses, even when there is no reliance on the government's assistance, is far more likely to increase the reluctance of the government to involve itself in such matters than it is to install a higher quality of performance in the federal employees assigned to carry such functions out. We do not believe that the expanded role of the federal government in the safety area through such legislation as OSHA indicates an intent of Congress to make the United States a joint insurer of all activity subject to inspection under the statute or others. Nor do we believe that there is any sound policy basis for requiring that government attempts to protect the public must be accompanied by per se tort liability if they are unsuccessfully carried out.

The passengers on this ill fated flight were acting for the highest of humanitarian motives at the time of the tragic crash. It would certainly be appropriate for a society to honor such conduct by taking those measures necessary to see to it that the families of the victims are adequately provided for in the future. However, making those kinds of decisions is beyond the scope of judicial power and authority. We are bound to apply the law and that duty requires the reversal of the district court's judgment in favor of the plaintiffs.



**Appendix D**

**Judgment of U.S. Court of Appeals, First Circuit, dated December 16, 1977**

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 77-1156.

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VERA ZABALA CLEMENTE, *et al.*,

*Plaintiff, Appellee,*

v.

UNITED STATES OF AMERICA,

*Defendant, Appellant.*

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JUDGMENT

Entered December 16, 1977

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed.

By the Court:

/s/ DANA B. GALLUP

*Clerk.*

## Appendix E

## Federal Aviation Act of 1958

(Excerpted from "Aeronautical Statutes and Related Material", Civil Aeronautics Board, Washington, D.C., revised Dec. 31, 1974)

### FEDERAL AVIATION ACT OF 1958

[*Act of August 23, 1958, 72 Stat. 731; as amended by Act of July 8, 1959, 73 Stat. 180; Act of August 25, 1959, 73 Stat. 427; Act of June 29, 1960, 74 Stat. 255; Act of July 12, 1960, 74 Stat. 445; Act of September 13, 1960, 74 Stat. 901; Act of July 20, 1961, 75 Stat. 210; Act of September 5, 1961, 75 Stat. 466; Act of September 13, 1961, 75 Stat. 497; Act of September 20, 1961, 75 Stat. 523; Act of October 4, 1961, 75 Stat. 785; Act of July 10, 1962, 76 Stat. 143; Act of October 11, 1962, 76 Stat. 832; Act of October 15, 1962, 76 Stat. 921; Act of October 15, 1962, 76 Stat. 936; Act of June 30, 1964, 78 Stat. 236; Act of August 14, 1964, 78 Stat. 400; Act of November 8, 1965, 79 Stat. 1310; Act of June 13, 1966, 80 Stat. 199; Act of October 15, 1966, 80 Stat. 931; Act of July 21, 1968, 82 Stat. 395; Act of September 26, 1968, 82 Stat. 867; Act of August 20, 1969, 83 Stat. 103; Act of May 21, 1970, 84 Stat. 219; Act of September 8, 1970, 84 Stat. 837; Act of October 14, 1970, 84 Stat. 921; Act of October 15, 1970, 84 Stat. 922; Act of December 23, 1970, 84 Stat. 1502; Act of December 29, 1970, 84 Stat. 1619, Act of December 31, 1970, 84 Stat. 1676; Act of November 18, 1971, 85 Stat. 481; Act of November 27, 1971, 85 Stat. 492; Act of March 22, 1972, 86 Stat. 95; Act of October 27, 1972, 86 Stat. 1239; Act of June 18, 1973, 87 Stat.*





*90; Act of January 2, 1974, 87 Stat. 1048; Act of August 5, 1974, 88 Stat. 409; Act of January 2, 1975, 88 Stat. 1960; Act of January 3, 1975, 88 Stat. 2102; and Act of January 3, 1975, 88 Stat. 2156*][22]

. . . . .

AN ACT

To continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes.

. . . . .

DECLARATION OF POLICY: THE BOARD

SEC. 102 [*72 Stat. 740, 49 U.S.C. 1302*] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

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[22] Section 6(c)(1) of the Department of Transportation Act (Public Law 89-670, approved October 15, 1966; 80 Stat. 931) effective April 1, 1967, which appears at page 131 of this publication, transferred all functions, powers, and duties of the Federal Aviation Administrator and the Federal Aviation Agency to the Secretary of Transportation. This publication, as well as the 1970 version, substitutes the words "Secretary of Transportation" for references to the Administrator, except where the context requires otherwise, and except for section 611 relating to noise abatement, in accordance with a ruling of the General Counsel, Department of Transportation. *The transfer to the Secretary is subject to the statutory requirement that the Administrator carry out the functions, powers, and duties of the Secretary relating to "aviation safety."* . . .

*Appendix E*

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve relations between, and coordinate transportation by air carriers;

(b) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

. . . . .

DECLARATION OF POLICY: THE SECRETARY OF TRANSPORTATION*

SEC. 103. [*72 Stat. 740, 49 U.S.C. 1303*] In the exercise and performance of his powers and duties under this Act the Secretary of Transportation* shall consider the following, among other things, as being in the public interest:

* See footnote 22, p. 57a.



*Appendix E*

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.

. . . . .

## TITLE III—ORGANIZATION OF ADMINISTRATION* AND POWERS AND DUTIES OF ADMINISTRATOR*

CREATION OF ADMINISTRATION*

### General

SEC. 301. [*72 Stat. 744, as amended by 78 Stat. 424, 49 U.S.C. 1341*] (a) There is hereby established the Federal Aviation Administration.* referred to in this Act as the "Administration". The Administration shall be headed by an Administrator* who shall be appointed by the President, by and with the advice and consent of the Senate.[5] The Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Adminis-

* See footnote 22, p. 57a.

tration, and shall have authority and control over all personnel and activities thereof. In the exercise of his duties and the discharge of his responsibilities under this Act, the Administrator* shall not submit his decisions for the approval of, nor be bound by the decisions or recommendations of, any committee, board, or other organization created by Executive order.

. . . . .

ORGANIZATION OF ADMINISTRATION*

Deputy Administrator

SEC. 302. [*72 Stat. 744, as amended by 75 Stat. 785, 76 Stat. 864, 78 Stat. 424, 49 U.S.C. 1342, 1343*] (a) There shall be a Deputy Administrator of the Administration* who shall be appointed by the President by and with the advice and consent of the Senate. The Deputy Administrator shall perform such duties and exercise such powers as the Administrator shall prescribe. The Deputy Administrator shall act for, and exercise the powers of, the Administrator during his absence or disability.

. . . . .

Officers and Employees

(f) The Secretary of Transportation* is authorized, subject to the civil-service and classification laws, to select, employ, appoint, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary to carry out the provisions of this Act, and to define their authority and duties, except that the Secretary of Transportation* may fix the compensation for not more than twenty-three positions at rates not to exceed the highest

* See footnote 22, p. 57a.



rate of grade 18 of the General Schedule of the Classification Act of 1949, as amended.

. . . . .

SEC. 303. [*72 Stat. 747, as amended by 84 Stat. 234, 49 U.S.C. 1344*]

. . . . .

Delegation of Functions

(d) The Secretary of Transportation* may, subject to such regulations, supervision, and review as he may prescribe, from time to time make such provision as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any function under this Act; or, with its consent, authorizing the performance by any other federal department or agency of any function under section 307(b) of this Act.

. . . . .

OTHER POWERS AND DUTIES OF SECRETARY OF TRANSPORTATION*

General

SEC. 313. [*72 Stat. 752, as amended by 84 Stat. 235, 49 U.S.C. 1354*] (a) The Secretary of Transportation* is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act.

. . . . .

* See footnote 22, p. 57a.

*Appendix E*

# TITLE VI—SAFETY REGULATION OF CIVIL AERONAUTICS

## GENERAL SAFETY POWERS AND DUTIES

### Minimum Standards; Rules and Regulations

SEC. 601. [*72 Stat. 775, 84 Stat. 1619, 1676, 87 Stat. 1048, 49 U.S.C. 1421*] (a) The Secretary of Transportation* is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Secretary of Transportation,* the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Secretary of Transportation* may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

* See footnote 22, p. 57a.



*Appendix E*

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Secretary of Transportation* may find necessary to provide adequately for national security and safety in air commerce.

### Needs of Service To Be Considered; Classification of Standards, etc.

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this title, the Secretary of Transportation* shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Secretary of Transportation* may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Secretary of Transportation* shall exercise and perform his powers and duties under this Act in such manner as will best tend to reduce or eliminate the possibility of, or

* See footnote 22, p. 57a.

*Appendix E*

recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this title.

. . . . .

AIRCRAFT CERTIFICATES

SEC. 603. [*72 Stat. 776. 49 U.S.C. 1423*]

. . . . .

Airworthiness Certificate

(c) The registered owner of any aircraft may file with the Secretary of Transportation* an application for an airworthiness certificate for such aircraft. If the Secretary of Transportation* finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate. The Secretary of Transportation* may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations as are required in the interest of safety. Each such certificate shall be registered by the Secretary of Transportation* and shall set forth such information as the Secretary of Transportation* may deem advisable. The certificate number, or such other individual designation as may be required by the Secretary of Transportation,* shall be displayed upon each aircraft in accordance with regulations prescribed by the Secretary of Transportation.*

. . . . .

* See footnote 22, p. 57a.



*Appendix E*

MAINTENANCE OF EQUIPMENT IN AIR TRANSPORTATION

Duty of Carriers and Airmen

SEC. 605. [*72 Stat. 778, 49 U.S.C. 1425*] (a) It shall be the duty of each air carrier to make, or cause to be made, such inspection, maintenance, overhaul, and repair of all equipment used in air transportation as may be required by this Act, or the orders, rules, and regulations of the Secretary of Transportation* issued thereunder. And it shall be the duty of every person engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply with the requirements of this Act relating thereto, and the orders, rules, and regulations issued thereunder.

Inspection

(b) The Secretary of Transportation* shall employ inspectors who shall be charged with the duty (1) of making such inspections of aircraft, aircraft engines, propellers, and appliances designed for use in air transportation, during manufacture, and while used by an air carrier in air transportation, as may be necessary to enable the Secretary of Transportation* to determine that such aircraft, aircraft engines, propellers, and appliances are in safe condition and are properly maintained for operation in air transportation; and (2) of advising and cooperating with each air carrier in the inspection and maintenance thereof by the air carrier. Whenever any inspector shall, in the performance of his duty, find that any aircraft, aircraft engine, propeller, or appliance, used or intended to be used by any air carrier in air transportation, is not in condition for safe operation, he shall so notify the carrier, in such form and manner as the Secretary of Trans-

* See footnote 22, p. 57a.

portation* may prescribe; and, for a period of five days thereafter, such aircraft, aircraft engine, propeller, or appliance shall not be used in air transportation, or in such manner as to endanger air transportation, unless found by the Secretary of Transportation* or his inspector to be in condition for safe operation.

. . . . . .

AMENDMENT, SUSPENSION, AND REVOCATION OF CERTIFICATES

Procedure

SEC. 609(a). [*72 Stat. 779, as amended by 85 Stat. 481, 492, 49 U.S.C. 1429*] The Secretary of Transportation* may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation,* he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation* may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificates), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation* shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation* for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to

* See footnote 22, p. 57a.





why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation* under this section may appeal the Secretary of Transportation's* order to the Board* and the Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's* order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's* order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Secretary of Transportation.* The filing of an appeal with the Board shall stay the effectiveness of the Secretary of Transportation's* order unless the Secretary of Transportation* advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation.* The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Secretary of Transportation* shall be made a party to such proceedings.

. . . . . .

SEC. 1005. [*72 Stat. 794, as amended by 73 Stat. 427, 49 U.S.C. 1485*] . . .

Compliance with Order Required

(e) It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply

* See footnote 22, p. 57a.

*Appendix E*

with any order, rule, regulation, or certificate issued by the Secretary of Transportation* or the Board* under this Act affecting such person so long as the same shall remain in effect.

. . . . . .

* See footnote 22, p. 57a.



## Appendix F

## Federal Tort Claims Act

28 USC § 1346. UNITED STATES AS DEFENDANT

. . . . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

. . . . . .

June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2(a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub.L. 85-508, § 12(c), 72 Stat. 348; Aug. 30, 1964, Pub.L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub.L. 89-719, Title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub.L. 91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub.L. 92-562, § 1, 86 Stat. 1176.

28 USC § 2674. LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

*Appendix F*

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

. . . . .

28 USC § 2680. EXCEPTIONS

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

. . . . .

As amended July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, §§ 2(a) (2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub.L. 86-168, Title II, § 202(b), 73 Stat. 389; Mar. 16, 1974, Pub.L. 93-253, § 2, 88 Stat. 50.



## Appendix G

## Civil Code of Puerto Rico, 1930 Edition

§1802 (31 LPRA §5141). A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity.

§1803 (31 LPRA §5142) . . .

The Commonwealth is liable in this sense under the same circumstances and conditions as those under which a private citizen would be liable.

. . . . .

§1058 (31 LPRA §3022). *Unforeseen or inevitable events.*

No one shall be liable for events which could not be foreseen, or which having been foreseen were inevitable, with the exception of the cases expressly mentioned in the law or those in which the obligation so declares.